COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 018368-93**
Robert Casagrande	Employee
Massachusetts General Hospital	Employer
Massachusetts General Hospital	Self-insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Levine)

APPEARANCES
Richard Heavey, Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the self-insurer on brief
David L. Cronin, Esq., for the self-insurer at hearing and previous appeal

MAZE-ROTHSTEIN, J. This case has been previously addressed by the reviewing board. See Casagrande v. Massachusetts Gen. Hosp., 12 Mass. Workers' Comp. Rep. 137 (1998). In Casagrande, we recommitted the decision for further findings on various issues. Casagrande, supra. A second decision issued. (Hereinafter, "Dec. II"). The employee appeals that decision claiming error. Due to insufficient analysis of the factors triggering the initial recommital, the case is once again recommitted for further findings. G. L. c. 152, § 11C.

As the facts have already been set forth in their entirety, we do not restate them here. See Casagrande, supra at 138-139. We do, however, reiterate the issues that were to be addressed on recommital. First, we requested additional findings be made on the employee's medical disability and earning capacity, if any. Second, the judge was instructed to determine whether the self-insurer would be unduly prejudiced by the allowance of the employee's motion to join a § 34A permanent and total benefits claim pursuant to 452 Code Mass. Regs. § 1.23(1).[1] Third, the judge was to specifically

[1] 452 Code Mass. Regs. § 1.23(1) reads in pertinent part:

address and make sufficient findings on the employee's allegation of bias on the part of the § 11A[2] impartial examiner. And also necessary was the identification of which medical reports were admitted into the evidentiary record and findings on those records as deemed appropriate. Casagrande, supra at 140-141.

In the second decision, the judge restated his previous findings as to the employee's physical impairments. He did add, however, the self-insurer physician's reported opinion that the employee should avoid heavy lifting or repetitive use of his arms at shoulder height or above. This opinion, reasoned the judge, "buttresse[d his] findings of § 35 rather than § 34A." (Dec. II, 2.) He then allowed the motion to join § 34A as of the second decision filing date and precipitously concluded that there was insufficient evidence to support a claim for § 34A benefits. (Dec. II, 3.) Further, the judge determined that the medical reports and deposition testimony of the § 11A examiner, read in their "totality," demonstrated no evidence of bias. (Dec. II, 4.) Finally, the judge obliquely identified the medical reports that were admitted into evidence. (Dec. II, 2, 4.)

The employee raises several issues on appeal. First, he asserts that the determination of an earning capacity lacks support in the evidence. (Employee's brief, 2.) Next, the employee proffers that the judge erred in joining the § 34A claim in the second decision only to conclusively deny it in the very next sentence. (Employee's

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> At the time of a conference or thereafter, a party may amend such claim or complaint only by filing a motion to amend with an administrative judge. Such a motion shall be allowed by the administrative judge unless the amendment would unduly prejudice the opposing party.

[2] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996).

brief, 5-7.) Lastly, he contends the finding of no § 11A doctor bias was error. (Employee's brief, 8.)

At the outset, we note that the level of analysis performed by the administrative judge on the first two issues was inadequate. We agree with the employee that the judge again failed to make the sufficient subsidiary findings to support the assigned earning capacity. Earning capacity is the product of analyzing the degree of physical impairment and its effect together with existing vocational factors such as age, education and work experience. Scheffler's Case, 419 Mass. 251, 256 (1994). Here, the judge relied solely on medical opinions to determine earning capacity. In one instance he adopted a medical opinion that the employee developed a causally related hernia, but neglected to address its impact on the employee's overall physical capabilities. (Dec. II, 2.) Next, the judge stated that one other medical opinion, finding a 15 % loss of function to the employee's neck, substantiated his finding of partial disability. (Dec. II, 2.) Neither earning capacity finding incorporated the necessary consideration of the employee's vocational profile.

An apparent independent review of vocational factors is found in the statement that: "[I]n the [employer's] maintenance and medical departments of the hospital there are a number of light jobs that an employee who says he is anxious to return to work could seek . . . ." (Dec. II, 3.) However, this commentary is no more than conjecture as there was no commensurate finding of a § 35D(3)[3] job offer suitable for this employee whom the judge found partially incapacitated. Determination of an earning capacity requires actual analysis of the relevant vocational factors, rather than mere recital of variables and/or pure speculation. Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 171-172 (1995). Accordingly, this issue must be revisited. On recommittal,

[3] General Laws c. 152, § 35D(3), as amended by St. 1991, c. 398, § 65, reads in pertinent part:

> For purposes of sections . . . thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:
>
> . . .

the judge must make sufficient subsidiary findings as to the employee's earning capacity, if any, to enable proper appellate review. See Ballard's Case, 13 Mass.App.Ct. 1068, 1069 (1982)(findings should be set forth with such clarity as to enable reviewing body to determine whether correct principles of law have been applied to facts).

As to the employee's second issue, we note that the joinder of the § 34A claim was tainted by legal error and is contrary to the fundamental principles of due process. Constitutional due process requirements apply to board hearings. Haley's Case, 356 Mass. 667 (1972). Fundamental requirements of due process entitle parties to a hearing at which they have an opportunity to present evidence, to examine their own witnesses, to cross-examine witnesses of other parties, to know what evidence is presented against them and to have an opportunity to rebut it, as well as to develop a record for meaningful appellate review. Id. An administrative judge has broad discretion, and indeed an obligation to control the conduct of hearings and related proceedings. Saez v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 20, 22 (1993). This includes depositions and discovery authorizations, granting of continuances and enforcement of reasonable deadlines, and even the discretion to dismiss a claim for lack of prosecution in appropriate circumstances to facilitate administrative efficiency. Ackroyd's Case, 340 Mass. 214, 218-219 (1960).

However, judicial discretion to conduct and control proceedings is not unbridled and is subject to appellate review. Ackroyd's Case, supra at 219. Notwithstanding the discretion a judge has to set and conduct hearings and related proceedings, fundamental due process requires that all parties have the aforementioned opportunity to develop a case for that adjudicator's consideration. Meunier's Case, 319 Mass. 421 (1946). Furthermore, as due process and the ability to be actually heard is a keystone of our system of laws, the unremitting pressure to efficiently resolve cases must be tempered by

(3) The employee's receipt of written report that a specific suitable job is available to him together with a written report from the treating physician that the employee is capable of performing such job shall be prima facie evidence of an earning capacity under this clause.

judicial conveyance of real and perceived sense of fairly administered justice permeating each proceeding. Botsaris v. Botsaris, 26 Mass. App. Ct. 254, 257-258 n.5 (1988).

The employee initially moved to join his § 34A claim on May 29, 1996, some seven months post-hearing. (Dec. II, 2.) The administrative judge stated that allowance of the joinder motion when first requested would have disadvantaged the self-insurer in that it was not aware that a § 34A claim was pending. (Dec. II, 3.) He then allowed the motion *as of the filing date* of his second decision and proceeded to find on the basis of the evidence he heard three years earlier, at the initial de novo proceeding, that there was insufficient evidence to support a claim for an award of § 34A. (Dec. II, 3.) The judge offered no support in the record or reasoning for this determination other than that solitary conclusory finding. Id.

Ruling favorably on the joinder of the § 34A claim at the recommittal decision stage of the proceedings required further medical evidence, and possibly additional lay testimony, to assure due process to the parties and as substrate for adequate findings on that disputed claim.[4] In doing so without notice to the parties at any time prior to the decision, the judge relied on evidence proffered for the purpose of establishing ongoing § 34 benefits from the employee's perspective and discontinuance of § 34 benefits from the self-insurer's vantage point. For example, the employee, who has the burden of proof on every element of a claim, may very well have wanted to submit evidence of permanence of the medical disability. See G. L. c. 152, § 34A; Atherton v. Steinerfilm, Inc, 11 Mass. Workers' Comp. Rep. 114, 117 (1997)(for discussion of the requirements of a showing of permanence); Yoffa v. Mutual Life Ins., 304 Mass. 110, 111 (1939). The self-insurer would have undoubtedly wanted to defend against that and other aspects of the claim. Since both parties were denied a full opportunity to present their evidence

[4] 452 Code Mass. Regs. § 1.07(2)(f) reads:

> Claims for benefits under M.G.L. c. 152 §§ 34, 34A and 35 shall be accompanied by a copy of a physician's report or record not more than six months old that describes the extent of the employee's physical or emotional incapacity for work and which relates said incapacity to the claimed industrial injury.

with respect to the § 34A claim after the judge's joinder, we recommit this portion of the decision as well.

We summarily affirm the judge's decision as to the employee's allegation of bias on the part of the § 11A examiner.[5] As the administrative judge no longer serves with the Department, we forward the case to the senior judge for reassignment to another administrative judge for a de novo hearing limited to those issues indicated herein. Given the passage of time, the assigned judge may take such updated medical evidence and lay testimony as is necessary to permit proper analysis of the employee's § 34A claim or any earning capacity assignment that may be warranted.

So ordered.

Filed: November 14, 2001

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

[5] The employee did not raise, in this appeal, the fourth issue to be addressed on remand - that the judge list those medical reports admitted into evidence. See Casagrande, supra at 141. Although it would have been better practice to list the medical exhibits at the outset of the decision, the judge sufficiently identified -- in the body of his decision – those beginning medical reports that were admitted into evidence. (Dec. II, 2, 4.)