COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037920-13**

Robert F. Griffin	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

CORRECTED REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

This case was heard by Administrative Judge Braithwaite.

APPEARANCES
Brian C. Cloherty, Esq., for the employee
Thomas A. Richard, Esq., for the self-insurer

KOZIOL, J. This is the second time this case has been before the reviewing board. In 2017, we reviewed, on cross-appeals, a different judge's November 4, 2016, hearing decision finding the employee sustained a work-related hearing loss on November 30, 2012.[1] At that time, we affirmed the judge's order of payment of § 36 loss of function benefits in the amount of $26,343.73, and §§ 13 and 30 medical benefits for hearing aids and medical treatment for hearing loss in both ears. However, we vacated the judge's denial and dismissal of the employee's §§ 34 and 35 claims and referred the matter to the senior judge for re-assignment to a different judge[2] with instructions to conduct "a proper analysis of the debilitating effects of [the employee's] injury and further findings of fact regarding his earning capacity." Griffin v. M.B.T.A., 31 Mass. Workers' Comp. Rep. 215, 215-216 (2017). We summarily affirmed the decision in all other respects. Id. at 219.

[1] Hereinafter, we refer to the November 4, 2016 hearing decision as "Dec. I" and the August 30, 2019, hearing decision as "Dec. II." We also refer to the transcript from the May 12, 2016, hearing as "Tr. I" and the transcript from the July 24, 2018, hearing as "Tr. II."

[2] The first judge no longer served as an administrative judge at the Department.

From the first decision, the following facts were established. The employee worked for at least 20 years inside subway tunnels where, "despite the high level of noise, workers were not permitted to wear ear protection on the job for safety reasons." Id. at 216. The employee's hearing damage " 'began in about 2004 and continued over 12 years until his last day of work.' " Id. at 216, quoting from (Dec. I, 7). The employee's last day of noise exposure was November 30, 2012, and he retired from the MBTA on December 1, 2012. Id. The first "judge also adopted the employee's testimony that, for safety reasons, he was precluded from using ear protection on the job at the MBTA, and now 'his hearing ability is insufficient for him to perform his work [there].' " Id. at 217.

In our prior decision, we observed that, "despite finding that the employee cannot return to his previous employment, the judge noted that the employee has demonstrated the ability to work unrestricted 'in a full-time, full-duty capacity in any job where he will not be exposed to unprotected loud noise.' " Id. 217. Moreover, "regardless of any deficit correction afforded by the employee's use of hearing aids, the judge found he remains medically unable to ever return to his prior employment with the MBTA." Id. at 217. In discussing the tension between these findings and the judge's subsequent denial and dismissal of the employee's claim for incapacity benefits, we stated:

> The judge has essentially determined that the employee, who is disabled from returning to his job at the MBTA, can earn his pre-injury average weekly wage of $1,236.80 (Dec. 7). She also found that, due to the extent of his hearing loss, he has been unable to obtain gainful employment after retiring from the MBTA, except for a temporary assignment as a custodian for the USPS. (Dec. 6, 7.) However, she 'made no findings identifying the factual source supporting [her] conclusion that despite [his] restriction, the employee was able to perform work in the open labor market earning his pre-injury wage.' Anitus v. Naratone Security Corp., 24 Mass. Workers' Comp. Rep. 221, 223 (2010). Because the employee cannot return to the same type of work he has done for 20 years, and it is unclear what he is capable of earning in other types of jobs, we agree that the judge failed to perform the foundational analysis required to determine his earning capacity, if any, under these circumstances.

Id. at 218. We concluded, the lack of "adequate findings of fact led to the judge's failure to analyze adequately, the requisite factors assessed in determining incapacity and the extent thereof." Id. 219. Our recommittal "for further findings consistent with this opinion," id., was on this limited issue.

The matter was reassigned to the present judge for determination of the employee's claim for weekly incapacity benefits. At a status conference in January of 2018, "it was determined that [the judge] would review the hearing transcript of May 12, 2016, and that the Employee will testify as to the 'debilitating effects of his injury and further finding of fact regarding his earning capacity [sic]' from May 13, 2016 to today's date. The parties agreed they will not call any other witnesses in this case." (Dec. II, 3; Tr. II, 5.)

At the hearing on July 24, 2018, the judge stated, without objection, that the employee's claim was for § 34 temporary total incapacity benefits from December 1, 2012, to date and continuing, as well as § 35 benefits from April 30, 2013, to date and continuing, and that the self-insurer "denies disability and extent thereof" and raises G. L. c. 152, § 35D and "Chinetti's Case." (Tr. II, 5-6.) The judge noted that the prior judge found the reports of the § 11A examiner, Dr. William E. O'Connor,[3] adequate, but allowed the self-insurer to submit an IME regarding the issue of hearing loss, which the self-insurer acknowledged was for the purpose of addressing the employee's § 36 claim for loss of function. The judge then ruled, "given that [Dr. O'Connor's] reports are more than two years old I have allowed the parties to provide any recent medical evidence in this particular case." (Tr. II, 7.) The self-insurer objected to this ruling. (Tr. II, 8.) The judge also allowed the employee's oral motion to join the issue of tinnitus to the case, (Tr. II 7-8), which the self-insurer also objected to, stating:

> [W]ith respect to the tinnitus that is a new claim being addressed for the first time. So I would also object to any new claim for that or any medical evidence being submitted for the tinnitus claim. And the tinnitus claim should not be taken into

[3] Dr. O'Connor issued a report dated January 26, 2016, and an addendum dated March 28, 2016. (Dec. II, Ex. 1.)

> consideration when determining disability and the extent thereof for today's proceeding.

(Tr. II, 9.) The judge denied the self-insurer's motion to submit a hearing transcript from a different employee's case, tried before a different judge, which allegedly contained the testimony of Mr. Ronald Nichols, the employer's chief safety officer, and testimony of the employee, Mr. Griffin. (Tr. II, 13-15.)

The parties now cross-appeal from the judge's hearing decision ordering the self-insurer to pay the employee § 35 benefits from March 28, 2016, to date and continuing at a rate of $502.08 per week, based on an average weekly wage of $1,236.80 per week and an earning capacity of $400.00 per week. (Dec. II, 15-16.) The judge also ordered the insurer to "pay medical treatment pursuant to § 30 for hearing loss and tinnitus." (Dec. II, 16.) Out of the many issues raised on appeal,[4] the only one requiring a reversal of a portion of the decision is the employee's claim that the judge erred by failing to address the employee's disability and extent of incapacity from December 1, 2012, through March 27, 2016. Otherwise, for the reasons set forth below, we affirm the remainder of the judge's decision.

Insurer Appeal

We begin by addressing five of the six issues raised by the self-insurer, summarily affirming on the remaining issue. Specifically, the self-insurer asserts the judge erred by: 1) opening the medical evidence without making a finding that Dr. O'Connor's reports were inadequate or the medical issues complex; 2) allowing the employee's claim for tinnitus; 3) refusing to allow the admission of testimony from the employer's chief safety officer, Ronald Nichols, and the employee, from a different case tried before a different judge regarding a different employee's workers' compensation claim; 4) refusing to

[4] The employee raises two issues on appeal; the self-insurer raises six. The department received the employee's appeal first. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of board file). Accordingly, for briefing purposes, the employee is considered the "appellant." 452 Code of Mass. Regs. § 1.15(4)(h). However, the employee did not exercise his right to file a reply brief addressing the self-insurer's arguments on appeal.

allow the self-insurer to question the employee about the circumstances surrounding his retirement; and, 5) failing to address all of the issues in controversy, in violation of G.L. c. 152, § 11B.[5]

1. Failure to make findings of inadequacy or complexity regarding § 11A report.

We agree it would have been preferable for the judge to expressly find the § 11A reports inadequate. However, the record unmistakably shows that inadequacy was the reason the judge made this ruling. The judge stated, "given the reports are more than two years old," he was opening the record for "the parties to provide any recent medical evidence in this particular case." (Tr. II, 7; Dec. II, 5.) Under the circumstances presented here, where the claim concerned past as well as present/ongoing disability and the extent of incapacity, the judge did not abuse his discretion by finding, in essence, that the report of the § 11A examiner was inadequate due to its staleness.

> [E]ven § 11A expert medical opinions can be rendered inadequate due to staleness. See Cipoletta, [v. Metropolitan Distr. Comm'n, 12 Mass. Workers' Comp. Rep. 206, 208 (1998)](based on one and one-half year delay between conference and hearing, judge ruled § 11A report stale and therefore inadequate); Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. (May 15, 2003)(no error in administrative judge, sua sponte, finding § 11A report inadequate due, in part, to fact report was seven months old at the time of hearing, when insurer failed to file post § 11A deposition motion that inadequacy had been cured).

Casey v. Town of Brookline, 17 Mass. Workers' Comp. Rep. 302, 309 n. 9 (2003). Cf. Berube v. Massachusetts Turnpike Authy., 12 Mass. Workers' Comp. Rep. 172, 175 (1998)(recommittal required where parties left "in the dark" about judge's reasons for opening the medical evidence and the purpose for allowing additional medical evidence). The judge did not err in allowing the submission of additional medical evidence.

2. Joinder of employee's claim for tinnitus.

[5] General Laws, c. 152 § 11B states in pertinent part:

> Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision.

The self-insurer argues the judge erred as a matter of law by allowing the employee's claim for tinnitus. It argues the employee:

> 1) failed to give fair notice of [the] claim and enough information about the underlying facts to apprise the [self-insurer] of the nature of the dispute, 2) failed to raise his claim in the first hearing and therefore waived it, 3) failed to give the self-insurer notice of the claim as soon as practicable, and 4) failed to file his claim within four years from the date he first became aware of the causal relationship between his alleged disability and his employment.

(Self-ins. br. 8-10.)

The self-insurer's allegation that it was not given fair notice of the tinnitus issue and enough information about the underlying facts to apprise it of the nature of the dispute has surface appeal. The joinder took place following the employee's oral motion made the morning of the hearing; the medical record supporting the claim, a February 27, 2018, report of Dr. Steven Freedman, was produced by employee's counsel, that same morning in response to the judge's ruling opening the medical record. (Tr. II, 7-8, 12; Dec. II, 10, Ex. 5.) However, although it objected to the joinder at the time the motion was presented and approved, the self-insurer did not request any additional time to prepare a defense in response to joinder. Rather, both employee's counsel and the self-insurer proceeded to question the employee about the tinnitus claim. (Tr. II, 17-18, 20, 22, 27-28, 39, 40-41.) The record also shows that the self-insurer was given ample time to have the employee examined by its IME, Dr. David Vernick, and Dr. Vernick's reports and his March 29, 2019, deposition testimony were admitted in evidence. The adopted findings of Dr. Vernick show that the doctor was able to formulate definite opinions about the employee's tinnitus claim. (Dec. II, 10-12.) There is no showing that, as a result of the joinder, the self-insurer was prevented or otherwise impaired in its ability to mount a defense against the claim, or that it lacked enough information to understand the nature of the employee's claim. In short, the record fails to support the self-insurer's claim that it was prejudiced by the joinder of the tinnitus issue.

We further disagree with the self-insurer's assertion that the employee was precluded from raising the issue of tinnitus because he failed to raise it in the prior

hearing and therefore waived it. The issues in dispute at the hearing were the employee's past and present disability, incapacity and the extent thereof. We have long recognized that "[h]ealth and disability are mutable conditions subject to fluctuation and sometimes spontaneous change." Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 171 (1995). The hearing transcript shows the employee's testimony about his tinnitus concerned his symptoms occurring *after* the date of the last hearing, "May of 2016." (Tr. II, 17-18.) It was within the judge's discretion to determine whether to allow the motion to add the issue of tinnitus at hearing, and we find no abuse of that discretion. Altshuler v. Colonial Hilton Hotel, 7 Mass. Workers' Comp. Rep. 62, 62 (1993)(joinder of issues is "within the discretion of the administrative judge in furtherance of the policy of conserving adjudicatory resources by joining all issues in one hearing whenever reasonably possible").

Lastly, in support of its claim of error, the self-insurer cites the provisions of G.L. c. 152, § 41, late notice, claim and statute of limitations. Those provisions are affirmative defenses that, in regard to the issue of tinnitus, the insurer failed to raise at the time of the hearing, or at any other time prior to this appeal. Doherty v. Union Hospital, 31 Mass. Workers' Comp. Rep. 195, 203 (2017)(affirmative defense of statute of limitations must be raised at hearing or it is waived). Thus, the judge did not err in failing to address these defenses which were not timely raised, and were thus waived. See Desisto v. City of Boston, 33 Mass. Workers' Comp. Rep. __(10/22/19).

3. Refusal to admit transcript from a different proceeding.

The judge did not err in sustaining the employee's objection to the admission of a transcript of the employee's testimony and that of the employer's chief safety officer, Ronald Nichols, which was taken from a different case tried before a different judge concerning a different employee's claim. Regarding Mr. Nichols's testimony, the self-insurer asserted that the transcript was being offered to show "a change in the MBTA's policy" to allow employees to wear ear protection. (Tr. II, 13.) The employee objected, asserting Mr. Nichols's testimony was "that there might be some policy changes effective 2015 or 2016, years after my client, Mr. Griffin, sustained his injury and left work. I do

believe – therefore, I don't think it's even relevant to this case. . . . it's not like the MBTA is standing before the Court today saying we have a job offer for this gentleman. They don't. They didn't in the first hearing as well. So I think the Court has indicated that it was not relevant. And I would agree. . . ." (Tr. II, 14-15.)

Regarding the employee's testimony, the self-insurer asserted it "is related to his prior condition. And he talks about a lot of items that would be useful in determining what his current disability is and what the extent of that disability is." (Tr. II, 13.) In response to this assertion employee's counsel argued, "my recollection, as we speak here today, is that Mr. Griffin's testimony as a witness in that hearing did not involve anything to do with his hearing loss or his capabilities or limitations, that's my memory of it. He was not there to testify about hearing loss of his own. So I don't think he did." (Tr. II, 14.)

The judge ruled, "at this point I'm not going to allow the submission of Mr. Nichols' hearing testimony. And I'm not going to allow the submission of Mr. Griffin's testimony in that particular case. I think that in the first date of hearing I think that there was a very full description of the conditions that the employee worked in. And I think that is sufficient for this particular case." (Tr. II, 15.)

The parties disagreed about what the excluded transcript showed. Because the transcript was not offered as an exhibit for identification, or produced as part of an offer of proof, the self-insurer has failed to preserve the issue for proper review. Sheehan v. New England Renovations, Inc., 28 Mass. Workers' Comp. Rep. 147, 149 (2014), citing Mazzaro v. Paull, 372 Mass. 645, 652-653 (1977)(offer of proof respecting excluded evidence essential to preserve issue for appellate review). In any event, there is no doubt the judge properly excluded the transcript of Mr. Nichols's testimony. The self-insurer was offering the transcript of the testimony as evidence of the truth of the matters asserted therein. Yet, Mr. Nichols did not testify in the original hearing in this case, so the first judge did not make any prior findings about his credibility as a witness. Moreover, the present judge had no way to assess Mr. Nichols's credibility. "Without hearing live testimony [a] judge [is] not within [his] province to make a credibility

finding on contradictory evidence to rebut the prima facie case. The judge [is simply] not in a position to weigh all of the evidence." DiCenso v. Winchester Concrete & Carpentry, 7 Mass. Workers' Comp. Rep. 237, 239 (1993). Regarding the employee's alleged testimony, the self-insurer now recites on appeal a number of additional reasons why it was relevant to this case, none of which were submitted to the judge and were thus waived. Moreover, contrary to its claim on appeal, nothing in the record shows that the self-insurer was prohibited from using the transcript to impeach the employee's testimony at the present hearing. However, the self-insurer never made any effort to do so.

4. Refusing to allow questioning about the employee's retirement.

The self-insurer's assertion that it was prohibited from questioning the employee about the circumstances surrounding his retirement is overbroad and lacks merit. During the first hearing, the employee provided detailed testimony about the reasons he stopped working for the MBTA and retired. (Tr. I, 40-45.) The self-insurer had ample opportunity to question the employee about the circumstances surrounding his retirement at that time, yet it asked no questions about those circumstances. The first judge's decision contained specific findings addressing the self-insurer's defense based on McDonough's Case, 440 Mass. 603, 606 (2003),[6] and the reasons why the employee left his job at the MBTA. Although the self-insurer cross-appealed from that decision, it advanced no argument challenging those findings. Indeed, the self-insurer's brief in that appeal, merely asserted that judge did not err in denying and dismissing the employee's claim for weekly benefits because the medical evidence did not support such an award. (Self-ins. br. I, 4-9.)

During the second hearing, the self-insurer questioned the employee about his retirement, largely without objection. (Tr. II, 49-52.) During that exchange, the following occurred:

[6] The judge's decision (Dec. I, 7 n.1), erroneously cited the Supreme Judicial Court's subsequent decision after remand, McDonough's Case, 448 Mass. 79 (2006), which we discuss infra, n.7.

> Q: When I was looking through the retirement package for the MBTA, I noticed that on July 11, 2011 you had initially applied for retirement and then you later retracted and said I want to void that out. Do you recall that?
>
> A: Yes.
>
> Q: Do you know why you retracted your retirement at that point?
>
> Mr. Cloherty: Objection, Your Honor. I don't know what the relevance of that is. He testified he's receiving his monthly check. He testified he retired. Getting into the nuts and bolts of his application, applying for it, withdrawing it, delaying it.
>
> The Judge: I'm going to sustain his objection.
>
> Mr. Richard: Can I comment on that as to why?
>
> The Judge: You can tell me why you want to ask the question.
>
> Mr. Richard: I would like to ask the question because it does show intent and the change in circumstances as to any retirement that was contemplated.
>
> The Judge: Honestly, I don't think it's very relevant. So I'm going to sustain the objection.

(Tr. II, 50-51). "In accordance with general equity practice, a decree in a workers' compensation case will not be reversed for error in the . . . exclusion of evidence, unless substantial justice requires reversal." Indrisano's Case, 307 Mass. 520, 523 (1940)(and cases cited); Moss's Case, 451 Mass. 704, 714 (2008).

On appeal, the self-insurer still offers no argument as to why, when the prior judge's findings of fact concerning the circumstances surrounding the employee's separation from employment with the MBTA were affirmed by us on appeal, the employee's withdrawal of a retirement application more than a year before his injury and subsequent retirement, was relevant to this case. Hence, it has not shown the judge erred in his ruling. The self-insurer's broad allegation that it was prohibited from examining

the employee about the circumstances of his retirement on December 1, 2012, simply is not borne out by the record.

5. Failure to make findings of fact and rulings of law on all of the issues in dispute.

The self-insurer asserts that the judge erred by failing to address all the issues at hearing, in violation of G.L. c. 152, § 11B, by failing to address "McDonough's Case, Chinetti's Case, Martinelli's Case, and/or Baribeau's Case" because "all [these cases] suggest that the Employee's voluntary retirement bars him from weekly compensation." (Self-Ins. br. II, 16-17.) We disagree. The self-insurer admits this was a new or "expanded" defense. (Self-ins. br. II, 13.) As such, the judge properly failed to address the argument because the self-insurer waived any right to present it. The self-insurer not only failed to raise this defense in the first hearing, it failed preserve any right to have it addressed in the second hearing because it never challenged the first judge's findings that McDonough's Case, supra,[7] did not apply to this case, and we summarily affirmed her decision in that regard.

More importantly, the issue simply was not part of the tasks delineated in our recommittal order. The case was recommitted to the administrative judge for the limited purpose of conducting "a proper analysis of the debilitating effects of [the employee's] injury and further findings of fact regarding his incapacity," not for the judge to retry the entire case and make new findings of fact as to whether the employee was barred from receiving benefits because he retired. The judge understood his limited task and properly did not give the self-insurer a proverbial second bite at the apple, on a defense it did not properly raise or develop and that it abandoned by its own prior inaction.

[7] In McDonough's Case, the court held that where an employee voluntarily retired and four years later became ill and passed away from asbestosis, his widow was not eligible for benefits pursuant to the latency provisions of §35C, because, "there is no loss of earnings, no replacement benefits were warranted." Id, at 606. However, on recommittal, the reviewing board held that the provisions of the second paragraph of § 31 provided the widow with a minimum benefit of $110.00 per week, and this ruling was affirmed by the Supreme Judicial Court. McDonough's Case, 448 Mass. 79 (2006).

As discussed supra, during its prior cross-appeal from the first judge's decision, the self-insurer advanced no argument that the judge erred in her assessment of the self-insurer's "McDonough" defense. Indeed the first judge found:

> Raising McDonough's Case the IR argued unpersuasively that the EE had no weekly wage because he has retired from the MBTA and that at most he is eligible to receive the State minimum weekly payment. I am not persuaded by this argument because the EE's date of injury is 11/30/12, at which time he was still employed by the MBTA. The earning statements submitted show that the EE's average weekly wage on the date of injury was $1236.80. I find the earning statements to be credible and persuasive and further find the EE's average weekly wage at the time of the within industrial accident was $1236.80.

(Dec. I, 7.) The judge's findings and the record, (Tr. I, 6-7), show that the self-insurer's argument regarding McDonough's Case, supra, concerned the issue of average weekly wage, with the self-insurer initially arguing, "if there is an award made and a date of disability comes at a point where the employee was not actually earning wages on that date, . . .the case indicates that no benefits would be due." (Tr. I, 7.) The self-insurer did not argue that the employee voluntarily removed himself from the workforce by retiring and therefore was not eligible for *any* weekly benefits.

The self-insurer's argument also ignores the prior judge's specific findings of fact, that the employee sustained continuing hearing loss due to loud noise at work between 2004 and his last day of work in 2012, which "diminished his capacity" to do his job. (Dec. I, 7-8.) By the time he left work on November 30, 2012, his "work-induced hearing damage" had "diminished his capacity for the work he was doing for the MBTA to nil" because "his hearing ability is insufficient for him to perform his work at the MBTA," and "he and his supervisors felt it was unsafe for him to continue in his job." (Dec. I, 7-8, 9, 10.) In addition, the judge was "also persuaded by the EE's testimony that, except for his temporary assignment as a custodian for the USPS, his attempts to work after his retirement from the MBTA were unsuccessful because of the extent of his hearing loss." (Dec. I, 6.) These findings were not vacated by us on appeal. The present judge also expressly credited "the testimony offered by the Employee in the May 12,

2016 hearing, with respect to his work for the Employer, and his hearing loss resulting from this work." (Dec. II, 7.) These unchallenged findings of fact extinguish the viability of the alleged "defense" as a matter of law.

In any event, we have previously held that McDonough's Case, supra, should not be applied to cases like this one. Arslanian v. Dept. of Mental Retardation, 21 Mass. Workers' Comp. Rep. 83, 85 (2007).[8] Additionally, unlike Chinetti, there was no evidence that the employee received any "incentive payment for voluntarily leaving the workforce" when he retired. Chinetti v. Boston Edison Co., 13 Mass. Workers' Comp. Rep. 328, 330 (1999). Even in the presence of such an incentive, in Chinetti we affirmed the judge's decision awarding the employee weekly benefits where the judge credited the employee's "testimony that the reason he opted to take advantage of the retirement

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[8] In Arslanian, supra, we held:

> McDonough is inapposite for several reasons. First, the bar to compensation imposed by the McDonough court was in the context of a latency claim governed by the rate-shifting provisions of § 35C.
>
> Second, a discordance arises in the proposed application of McDonough, a § 31 death case, to a living employee's retirement or withdrawal from the labor market. For workers at least 65 years of age receiving §§ 34 or 35 benefits, § 35E sets out a *rebuttable presumption* of voluntary withdrawal from the labor force, and resulting bar to benefits, when certain enumerated circumstances are met. See Tobin's Case, 424 Mass. 250 (1997); Harmon v. Harmon's Paint & Wallpaper, 8 Mass. Workers' Comp. 432 (1994). We do not think the employee, who was fifty-seven years old when she retired, should face a retirement-based bar to compensation that is more easily established than that of § 35E.
>
> Third, McDonough addressed *voluntary* retirement, which the judge found was *not* the case here, as the employee retired for reasons related to her injury. (Dec. 6-7.)
>
> Finally, the court's reasoning in McDonough included the nature of the pension payment: "When [the employee] retired, he took his pension as a lump sum, and was not in receipt of any stream of earnings-related income at the time of his death." 440 Mass. at 606. The present employee receives ongoing pension payments, which represent a "stream of earnings-related income" under the McDonough rationale.

Id. at 85.

incentive was his feeling that he could no longer do his job." Id. As we noted then, the insurer's theory was that "*only* the generous retirement benefits caused the [employee] to retire," and we stated, "voluntary retirement does not bar an employee from receiving weekly workers' compensation benefits where an industrial injury caused the retirement." Id. (emphasis added.)

> Clearly, the fact of receipt of private pensions or retirement benefits that are generally cumulatively earned during one's work life, does not preclude receipt of workers' compensation except in the instances outlined in §35E, which is inapposite here. See G.L. c. 152 §35E; 9 A. Larson, Workers' Compensation Law §97.51 (1997).

Id. at 331. The Martinelli case is also inapposite. Martinelli v. Chrysler Corporation, 28 Mass. Workers' Comp. Rep. 35 (2014). There, we affirmed the judge's decision denying weekly benefits, where the judge found the employee was capable of working full-time plus overtime for his employer and left work voluntarily in exchange for a retirement package. Id. Similarly, in Baribeau the judge found the employee voluntarily retired from a job that he was capable of performing. Baribeau v. General Electric Co., 14 Mass. Workers' Comp. Rep. 263 (2000). Here, the prior judge found that as of the date of injury, November 30, 2012, employee was no longer capable of working at the MBTA because of his hearing loss. The judge credited the employee's testimony which supported this finding, (Tr. I, 42-43), as did the present judge. (Dec. II, 7.) There was no error.

Employee Appeal

We agree with the employee, however, that the judge erred when he failed to address the employee's disability and extent of incapacity for the entire time period in dispute.[9] The employee sought weekly incapacity benefits from December 1, 2012, to

[9] We summarily affirm the decision regarding the employee's first argument on appeal, that the judge's assignment of a minimum wage earning capacity to the employee was arbitrary, capricious and contrary to law. As such, we do not disturb the award of partial incapacity benefits based on a minimum wage earning capacity for the period from March 28, 2016, and continuing.

date and continuing. The judge however, awarded benefits from March 28, 2016, and continuing without addressing the time period from December 1, 2012, through March 27, 2016. The March 28, 2016, start date is the date of the addendum issued by the § 11A physician, Dr. O'Connor, but he did not examine the employee on that date. Rather, he issued the addendum after reviewing additional medical evidence submitted by the parties from medical examinations that predated the March 28, 2016, addendum. Thus, there was no change in the employee's medical condition that occurred on March 28, 2016, that would support a change in entitlement to weekly incapacity benefits. Incapacity evaluations require an anchor in the evidence, and here there is none. LaRoche v. Revere Housing Authy., 10 Mass. Workers' Comp. Rep. 717 (1996). Against this backdrop, however, the affirmed findings made by both judges dictate just one conclusion concerning the time period in dispute, and, as a result, there is no need to recommit the matter for further findings of fact.

The prior judge found, "The EE testified credibly that his work environment at the MBTA was extremely noisy, and that, for safety reasons, he was precluded from using ear protection." (Dec. I, 7.) The prior judge found that the employee was no longer capable of preforming his work at the MBTA as of November 30, 2012. (Dec. I, 7-8, 9, 10.) The employee's average weekly wage at the MBTA was $1,236.80. (Dec. II, 6.) The present judge credited "the testimony offered by the Employee in the May 12, 2016 hearing with respect to his work for the Employer." (Dec. II, 7.) He also expressly found, "I do not credit the employee's testimony that his hearing has gotten worse since May 12, 2016." (Dec. II, 8.)

The judge found the "Employee's hearing loss and tinnitus are causally related to his work for the Employer." (Dec. II, 12.) The judge "adopt[ed] Dr. Vernick's medical opinions" which included his opinion "that any hearing loss since December 1, 2012, is due to the natural progression of aging, not to any further noises." (Dec. II, 12.) Thus, the employee's condition for which he was awarded § 35 benefits, existed as of the date he left work. The judge found the employee "cannot return to work for the Employer," but, he "can return to work with proper ear protection and hearing aids that would allow

him to return to work" on a "full-time" basis. (Dec. II, 10, 12-13.) These findings establish that, unless the employee was vocationally capable of earning his pre-injury wage, he was entitled to collect partial incapacity benefits from December 1, 2012, and continuing. See, Anitus, supra at 223.

Even during the employee's brief stints of post-injury employment, however, he never earned a weekly wage commensurate with the wages he earned prior to his injury at the MBTA. As the present judge found, during the six to eight weeks the employee worked for the United States Postal Service, (USPS), in 2013, the employee earned an average weekly wage of $711.83 per week. During his eleven weeks as a laborer for American Concrete from November 24, 2014, through February 10, 2015, the employee earned a weekly wage of $462.36. (Dec. II, 4, 13.)

In our prior decision, we summarily affirmed the first judge's finding that, "I am also persuaded by the EE's testimony that, except for his temporary assignment as a custodian for the USPS, his attempts to work after his retirement from the MBTA were unsuccessful because of the extent of his hearing loss." (Dec. I, 6, 7.) The employee testified that the custodian position at the USPS was not available as a full-time position but only a temporary assignment designed to terminate after a period of weeks. (Tr. I, 44-45; Tr. II, 52.) There was no expert vocational evidence in the record.

Against this backdrop, the judge answered the question about the employee's earning capacity: "I find that the Employee is capable of working in the labor market with an earning capacity of $400.00, the standard earning capacity in 2016." (Dec. II, 13.) Thus, the judge set the employee's full-time (forty hours per week) earning capacity at the $10.00 per hour minimum wage in the Commonwealth, which became effective January 1, 2016. G.L. c. 151, § 1, as amended by St. 2014, c. 144, § 29. Spencer v. JG McLellan Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 150 (2016)(where no expert vocational evidence in record judge properly may assign minimum wage earning capacity in accordance with rates set by law in the Commonwealth). The minimum

wage in the Commonwealth has been adjusted over time.[10] Thus, as a matter of law and mathematics, the employee's entitlement to weekly benefits during the period not addressed by the judge may be readily calculated.

Accordingly, we reverse so much of the judge's order as commenced the payment of § 35 weekly incapacity benefits as of March 28, 2016, and order those benefits from December 1, 2012, and continuing. As ordered by the judge, the benefits are to be paid based on an earning capacity of the minimum wage in the Commonwealth as follows. The self-insurer shall pay the employee § 35 benefits at a rate of $550.08 per week based on a $320 per week earning capacity from December 1, 2012, through December 31, 2014, with the exception of the weeks the employee worked for the USPS in 2013 and American Concrete in 2014. During the eight weeks the employee worked for the USPS in 2013, the employee shall receive §35 benefits at a rate of $314.98 per week based on wages earned of $711.83 per week.[11] During the weeks he worked for American Concrete in 2014, from November 24, 2014 through December 31, 2014, the employee shall receive § 35 benefits at a rate of $464.66 per week based on wages earned of $462.36 per week. G.L. c. 152, § 35D(1) and (4).[12] From January 1, 2015 through

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[10] On December 1, 2012, the minimum wage in the Commonwealth was $8.00 per hour, yielding a weekly earning capacity of $320.00 per week. G. L. c. 151, § 1, as amended by St. 2006, c. 271, § 2. Effective January 1, 2015 through December 31, 2015, the minimum wage in the Commonwealth was adjusted again to $9.00 per hour, yielding a weekly earning capacity of $360.00. G.L. c. 151, § 1, as amended by St. 2014, c. 144, § 28.

[11] Neither party challenged the judge's findings regarding the wages earned by the employee at the USPS or at American Concrete Co., or the judge's findings regarding the length of time he worked at each job. The judge found the employee worked six to eight weeks at the USPS which was based on the employee's testimony. (Tr. I, 45; Tr. II, 52.) Because the employee has the burden of proving all of the elements of his claim, Sponatski's Case, 220 Mass. 526, 527-528 (1915), we are constrained to use the eight-week period, as the judge found it to be the outer limit of the time period the employee worked for the USPS. The employee admitted he could not be more accurate and thus, he could not prove six weeks was the length of time he worked there. (Tr. I, 45.)

[12] General Laws, c. 152, § 35D(1) and (4) states:

February 10, 2015, while the employee continued to work for American Concrete, the insurer shall pay § 35 benefits at a rate of $464.66 per week based on wages earned of $462.36 per week. From February 11, 2015, through December 31, 2015, the insurer shall pay the employee § 35 benefits at a rate of $526.08 per week based on an earning capacity of the minimum wage, $360.00 per week. From January 1, 2016 through March 27, 2016, and thereafter, pursuant to the judge's order, the employee shall be paid § 35 benefits in the amount of $502.08 per week based on an earning capacity of $400.00 per week. The self-insurer may take credit for payments it has already made. The judge's decision is otherwise affirmed.

The self-insurer is ordered to pay the employee's counsel a fee in the amount of $1,705.66 pursuant to § 13A(6).

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: ***May 5, 2020***

For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following-

(1) The actual earnings of the employee during each week.

. . .

(4) The earnings that the employee is capable of earning.