

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 030613-96

Robert Griffin
State Lottery Commission
Commonwealth of Massachusetts

Employee
Employer
Self-Insurer

REVIEWING BOARD DECISION (Judges Carroll, McCarthy and Levine)

APPEARANCES
Steven P. Brendemuehl, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee continuing partial incapacity benefits, with an assigned weekly earning capacity of \$155.00. The self-insurer argues that the judge's decision fails to adequately address the employee's present incapacity, in particular by ignoring testimony of his post-injury work activities. We agree that the judge needs to make significantly more detailed findings on the employee's vocational profile, and explain why it is that the employee's ability to earn is accurately reflected in the assigned \$155.00 weekly earning capacity. We therefore recommit the case.

Mr. Griffin, 66 years old at the time of the injury on August 1, 1996, injured his right dominant shoulder while working for the Lottery Commission in the State Treasurer's Department. He had been working there since 1990. The injury resulted in a torn rotator cuff, which was surgically repaired on December 13, 1996. (Dec. 4-5.) The self-insurer accepted liability for the injury. (Dec. 3.) The employee is a college graduate and has had extensive work experience as a licensed real estate broker, and in management of a real estate office and in other companies. (Dec. 4.)

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Griffin claimed temporary total incapacity benefits from the date of injury until September 15, 1997, and continuing § 35 incapacity benefits thereafter. Before the hearing on the claim commenced, he underwent an impartial medical examination pursuant to G.L. c. 152, § 11A. (Dec. 2.) The impartial physician diagnosed an acute shoulder injury, which resulted in right rotator cuff tear. The doctor found that the employee continued to experience symptoms in his shoulder which prevented return to normal use, and that he had reached an end result with an upper extremity impairment of 10%, due to loss of strength in the arm. (Dec. 5-6.) The doctor placed restrictions on the employee which included no lifting over 25 pounds, and no work over shoulder level. The judge adopted the opinion of the impartial physician. (Dec. 6.)

Based on the § 11A examiner's opinion, the employee's testimony – including his credited complaints of pain and his vocational profile – the judge awarded the employee the closed period of § 34 benefits sought, and continuing partial incapacity benefits with an assigned earning capacity of \$155.00.¹ The self-insurer appeals only the award of continuing § 35 benefits.

We agree with the self-insurer that the judge made inadequate subsidiary findings on the employee's vocational profile and earning capacity. The judge recounted that, prior to his employment with the Commonwealth, the employee worked for three years as vice-president of real estate operations for Re/Max Southeast, that he held a management position for a company called Librascope, and that he was self-employed as a real estate broker from 1970 to 1984. The judge noted that the employee's "testimony was that in most of these jobs he earned about \$30,000.00 a year." (Dec. 4.) This approximated what the employee earned working for the Commonwealth, as his stipulated average weekly wage was \$616.92. (Dec. 3.) The judge then made the following findings:

that the employee was earning \$30,000.00 or more while working for the office of the Treasurer and/or the State Lottery Commission and that while he was working for Librascope from 1984 to 1986 in California, through a job that one of his relatives got for him, was an indication that he was not

¹ The judge made explicit findings on the occurrence of an industrial injury, (Dec. 4, 6-7), even though liability for the injury was accepted and not at issue. (Dec. 2-3.)

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making that amount of money nor was he earning that much while he was self-employed as a real estate broker from 1970 to 1984. Under the circumstances, Mr. Griffin has been earning less money as he got older and his present condition does not improve things.

(Dec. 6.) We are puzzled by these findings. We must recommit the case for further findings so that the judge can clarify the reasoning used in reaching his assigned earning capacity of \$155.00 per week.

The judge stated that he considered the employee's age, education, background, training, work experience, mental ability, and other capabilities in assigning the weekly \$155.00 earning capacity. However, the judge has not told us how these factors enter into his reasoning. It is not enough that the judge merely incant the vocational factors enunciated in Frennier's Case, 318 Mass. 635, 639 (1945), and Scheffler's Case, 419 Mass. 251, 256 (1994). The judge must make findings addressing these factors. Faille v. U.S. Concrete, 11 Mass. Workers' Comp. Rep. 473, 477-478 (1997). For example, the judge did not make any findings regarding the employee's post-injury work managing his daughter's real estate office for approximately thirty-five hours per week. (Tr. I, 42-48.) Findings of fact in this area would be relevant in the calculation of this employee's earning capacity. See Peters v. City of Salem Cemetery Dept., 11 Mass. Workers' Comp. Rep. 55, 58 (1997).

Accordingly, because we think that the decision lacked adequate subsidiary findings of fact, see Donahue v. Petrillo, 8 Mass. Workers' Comp. Rep. 36, 41-42 (1994), we recommit the case for further findings on the employee's earning capacity.

So ordered.

Martine Carroll
Administrative Law Judge

Robert Griffin
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William A. McCarthy
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: **November 21, 2000**
MC/jdm