COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 013436-97**

Robin J. Donovan	Employee
Commonwealth Gas Company	Employer
Commonwealth Energy Systems	Insurer

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

APPEARANCES
Thomas H. O'Neill, Esq., for the employee
Carey H. Smith, Esq., for the insurer

MAZE-ROTHSTEIN, J. Robin Donovan appeals a decision that awarded her closed periods of G.L. c. 152, §§ 34 and 35 weekly partial incapacity workers' compensation benefits for an injury she sustained on April 15, 1997 while employed with the Commonwealth Gas Company. She contends error in the assignment of an earning capacity, in the finding that causation between the work injury and any incapacity ended as of October 2, 1998, and in the denial of the employee counsel's deposition costs related to a psychiatric evaluation. For the reasons set out in Scheffler's Case, 419 Mass. 251 (1994), we affirm the principal award of benefits. Because the employee prevailed at hearing, we reverse the denial of her deposition costs and recommit the case for a determination by the judge of a reasonable deposition fee.

Robin Donovan worked as a meter reading supervisor from 1989 to 1997 for the employer, Commonwealth Gas Company. (Dec. 6.) From April to September 1996, employees went on strike. Ms. Donovan worked the telephones and computers approximately 90 hours per week during this period and she experienced gradually increasing pain in her right upper extremity. Id. Starting in February of 1997, she

required treatment which included medication, a wrist brace and an order for massage, heat and ultrasound therapy. (Dec. 6-7.) On the doctor's order, and on his impression that Ms. Donovan had multiple repetitive strain injuries in the right upper extremity coupled with the possibility of depression and a sleep disorder, the employee left work. (Dec. 8.) She continued to treat conservatively through the hearing date. (Dec. 7.)

The employee's claim for benefits was not accepted. After a § 10A conference an order issued awarding the employee ongoing § 35 partial incapacity weekly compensation. The insurer appealed to a hearing de novo. (Dec. 3.) The employee was examined by a §11A[1] doctor. He was unable to identify an anatomic basis for the employee's continued complaints, which he opined were not work related. However, he did not doubt that she initially experienced repetitive strain injury. (Dec. 14.)[2]

On the record evidence, the judge determined that the employee sustained multiple strains as a result of overuse of her right upper extremity arising out of and in the course of her employment. (Dec. 7.) He then awarded a closed period of § 34 benefits and an assigned earning capacity with a closed period of § 35 benefits ending on October 2, 1998, the date of the § 11A doctor's report. (Dec. 19.)

On appeal the employee contends error in the earning capacity assignment and in the determination that work related causality ended as of October 2, 1998. (Employee's brief, 6,8.) We are unpersuaded by the employee's argument that the decision lacks adequate subsidiary findings grounded in the evidence. Factual findings as to when incapacity begins or ends must be grounded in the evidence found credible by the judge.

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[1] 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).

[2] The administrative judge allowed additional medical evidence due to his determination of the complexity of the medical issues. (Dec. 4.) Along with the § 11A doctor's deposition, three additional doctors were deposed, including a physician hired by the employee for psychiatric evaluation, whose deposition is the subject of this appeal. Also admitted into evidence were four additional physicians' reports as well as a number of hospital physical therapy rehabilitation reports. (Dec. 4.)

Skalski v. Phoenix Home Life, 13 Mass. Workers' Comp. Rep. 114, 116 (1999); Montero v. Raytheon Corp., 11 Mass. Workers' Comp. Rep. 596, 597 (1997). In addition, the date chosen by the judge to terminate benefits must be based on some change in the employee's medical or vocational condition. Demerit v. Town of North Andover School Dept., 11 Mass. Workers' Comp. Rep, 630, 633 (1997). Here the judge adopted the opinion of the § 11A doctor that the employee's alleged disability was not causally related to the industrial injury of April 15, 1997 as of the medical examination date, October 2, 1998. (Dec. 18.) The judge also adopted the May 12, 1999 opinion of the insurer's doctor identifying no etiology for the employee's complaints of pain and no clinical suggestion of medical disability at that time. (Dec. 13.) The decision clearly sets out findings based on the exhibits and depositions of the medical experts admitted at hearing. The interpretation of medical opinions on causal relationship is, in the first instance, for the administrative judge to determine. Triolo v. Commonwealth of Massachusetts, 14 Mass. Workers' Comp. Rep. 246, 251 (2000). The judge was well within his discretion in considering and deciding upon which medical opinions to adopt. And the medical opinions that were adopted all adequately supported this ultimate finding on the issue of causal relationship. Croze v. Kimberly Clark Corp., 12 Mass. Workers' Comp. Rep. 418, 420 (1998).

The employee's argument as to the assignment of an earning capacity is equally without merit. The employee contends that the findings are non specific and too indefinite to enable this board to determine with reasonable certainty whether correct rules of law have been applied. (Employee's brief 7, citing Cicerone v. Quincy Adams Restaurant & Pub, Inc., 14 Mass. Workers' Comp. Rep. 62, 64-65, 66 [2000]). We disagree. 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 found that the employee possessed significant transferable skills, including computer, telephone, bookkeeping and accounting as well as supervisory experience. (Dec. 17-18.) Those findings were consistent with the testimony of the vocational expert offered by the

insurer who indicated that the employee had the capacity to work in various positions in the greater Worcester area. (Tr. II, 80-84.)[3] Furthermore, adopting the medical opinion of the employee's treating physician, that as of September 2, 1997 the employee was capable of working three hours per day, led to the reasonable finding that the employee had a modest earning capacity. (Dec. 17.)[4] The Scheffler analysis is sufficiently clear to enable the reviewing board to determine that correct principles of law have been applied to the facts.[5] Compare Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45(1993)(for an instance where said determination could not be made). We therefore affirm the decision as to the employee's earning capacity and discontinuance of entitlement date.

The employee also challenges the denial of counsel's deposition expenses associated with a psychiatric evaluation performed by a doctor she retained. We agree that since the employee prevailed at hearing she was entitled to reasonable expenses associated with depositions conducted on her behalf. Connolly's Case, 41 Mass. App. Ct. 35 (1996).

The insurer responds that in denying costs related to the deposition of the employee's evaluating psychiatrist the administrative judge "no doubt determined that his deposition was completely unnecessary." (Insurer's brief 12.) However, the insurer's argument is conjectural, as the decision lacks any finding on the reasonableness of the expenses incurred for the deposition. Moreover, due to the complexity of the medical issues, G.L. c. 152, § 11A(2), the judge specifically authorized the submission of

[3] The administrative judge also found that the employee at the time of hearing had taken an early retirement and that returning to work was not an issue, as she had no plans to seek employment. (Dec. 8.)

[4] The employee's treating physician based the three hour work day determination on a number of medical indications which included the fact that the employee had not responded to any aggressive treatment at all including being out of work for quite a period of time, therapy, injections, consultations and medications suggesting that "something else is going on." (Dec. 8, 17.)

[5] In his decision the judge analyzed the lay testimony and the medical evidence and was not persuaded that the employee's present problems were work related.

additional medical evidence and granted permission for the deposition of the employee's evaluating psychiatrist. (Dec. 4 and see n. 1 supra.) In the subsidiary findings, the judge refers to the employee's evaluating psychiatrist and cites to his deposition transcript on eight occasions, highlighting opinions rendered as to her inability to work, recommendation for group therapy to address her restrictions, complaints of pain, activities and absence of clinical depression. (Dec. 11-12.) Through reliance on this and other medical evidence, the judge provided an adequate explanation for the award of benefits. It hardly seems the judge found the contested deposition "completely unnecessary."

We take guidance from G.L. c. 152, § 9A, amended by St. 1986, c. 662, §10, which provides in pertinent part;

> Whenever a medical question is in dispute in any case, . . . the employee may engage his own physician, and one additional physician if the administrative judge finds that justice and equity require the same, to appear and testify or be deposed, in his behalf, and, if the decision of the administrative judge or reviewing board is in favor of the employee, a reasonable fee shall be allowed by the administrative judge or reviewing board for the services of each such physician and shall be added to the amount so awarded and be paid by the insurer under the provisions of this chapter; provided, that, notwithstanding the foregoing, in every case wherein the decision of the administrative judge or reviewing board is in favor of the employee, if more than one physician appeared and testified in behalf of the insurer a reasonable fee shall be allowed for the services of each of the physicians, up to a like number, who appeared and testified or were deposed in behalf of the employee, which fees shall be added to the amount so awarded and be paid by the insurer under the provisions of this chapter.

The statute provides for the allowance of a reasonable fee for the deposition of additional physicians to be paid by the insurer if the employee prevails. See also 452 Code Mass. Regs. § 1.19(2)(insurer payment of "necessary and reasonable expenditures"). Accordingly, an award of a reasonable fee must be determined for the costs incurred by the employee's counsel for the evaluating psychiatrist's deposition.

We affirm the decision as to the principal award of benefits. We reverse and recommit the case for a finding on a reasonable payment for the deposition fee incurred by the employee's counsel relative to the psychiatric evaluation.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: December 20, 2001