COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INUDSTRIAL ACCIDENTS **BOARD NO. 14503-94**

Roger Baribeau	Employee
General Electric Co.	Employer
General Electric Co.	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith[1])

APPEARANCES
Nancy L. Hall, Esq., for the employee at hearing
Paul A. Gargano, Esq., for the employee on appeal
Kevin P. Jones, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

WILSON, J. The employee appeals a decision in which an administrative judge denied his claim for further incapacity benefits after an accepted industrial injury to his back. The judge found that the employee had left his modified position with the employer voluntarily, had retired from the work force, and thereby relinquished his claim for further incapacity benefits. The employee challenges the judge's fact-finding and legal conclusions. We affirm the decision.

Mr. Baribeau, fifty-seven years old at hearing, injured his back on April 7, 1994, and received incapacity benefits for several months. (Dec. 4.) The employee returned to work in a light duty capacity on August 4, 1994, but began to experience increased back and groin pain as of February 1995. Nevertheless, he continued working until August 1996, when he experienced severe pain upon getting up from the dinner table. (Dec. 5.) At that time the employee underwent MRI testing, which indicated concentric disc protrusions at L3-4, L4-5 and L2-3. He returned to work on September 23, 1996, at first

[1] Judge Smith no longer serves as a member of the reviewing board.

part-time, and eventually full time. On June 24, 1997, the employee reinjured his back and, although he did not leave work for any time after that occurrence, he was assigned work as needed but not assigned any individual job-tasks from that time until he retired on October 1, 1997. (Dec. 6.) Nonetheless, the employee was paid his full wage, even though he considered that he was not performing any productive work. The employee applied for a special early retirement option in July 1997, effective October 1, 1997. (Dec. 7.)

The employee claimed continuing § 34 benefits from October 1, 1997, which claim the judge denied at the § 10A conference. The employee appealed to a full evidentiary hearing and, on July 13, 1998, was examined by an impartial physician pursuant to § 11A(2). (Dec. 2.) The impartial physician opined that the employee had a chronic back strain with evidence of disc protusion at L3-4, causally related to the April 7, 1994 industrial injury. He concluded that the employee was partially disabled, but could perform a job that did not require lifting over 20 pounds more than once every fifteen to twenty minutes, with no bending or twisting. The judge adopted the doctor's opinions. (Dec. 8.)

The judge did not credit the employee's reports of the degree of pain or limitations he experienced as a result of his industrial injury. (Dec. 8-9.) The judge found that the employee was not entitled to incapacity benefits, as his earnings at the time of his retirement matched his average weekly wage. He also concluded that the employer had accommodated the employee and provided him with modified work, consistent with the restrictions set by the impartial physician, at no loss of pay. But for the employee's personal decision to retire, unrelated to his ability to perform the modified job, the judge determined that he would have been earning his pre-injury wage. (Dec. 8, 10.) Hence, the judge denied the employee's claim for further incapacity benefits. (Dec. 11.)

The employee argues on appeal that the decision is internally inconsistent, and thus should be recommitted for further findings and clarification. The employee questions the judge's findings that he was working within light duty restrictions from June 25, 1997 until October 1, 1997, (Dec. 10), as compared to his findings that the

employee did not perform *any* productive work at that time, and that he neither requested nor was assigned work. (Dec. 6, 7.) We take note of the lack of clarity in the judge's subsidiary findings of fact.[2] We are not persuaded however, that there is any consequence to the inexact nature of the findings as a matter of law. "The [judge's] decision leaves something to be desired but nevertheless furnishes an adequate basis for judicial review." Forni's Case, 10 Mass. App. Ct. 850 (1980)(rescript op).

This case turns on the undisputed fact that the employee earned the same while working during the June-October 1997 period as he had earned prior to his injury, regardless of *what* he was doing during the disputed post-injury period. The employee makes no argument that he was asked to perform any task that exceeded his medical limitations. Moreover, the judge's findings are quite clear on the other pertinent fact – that the employee left this light duty (or make-work) position *voluntarily*, without being laid off, compare Bradley v. Commonwealth Gas Co., 13 Mass. Workers' Comp. Rep. 142, 146 (1999), or having a realistic anticipation of a lay-off. See Bajdek's Case, 321 Mass. 325 (1947).

The employee's reliance on Bajdek, id., merits a brief discussion. In that case, the court affirmed the board's finding that "while [the employee's] leaving the insured was voluntary in the sense that the decision was his own, *the underlying ground was his desire to remain employed consecutively and without interruption*." Id. at 329 (emphasis added). The case is inapposite to the present situation for the plain reason that the employee here was leaving work entirely voluntarily, without the reasons that motivated Bajdek; namely, a more stable employment future. In the case at hand we have "an employee who, although capable of doing so, chose [in July 1997] not to earn wages." Vass's Case, 319 Mass. 297, 300 (1946). The employee's actual post-injury wages being established, the plain and unambiguous language of § 35D(1) applies to establish the employee's earning capacity:

[2] We agree with the self-insurer, however, that all of the judge's findings regarding the work that the employee did or did not perform from June through October 1997 were entirely supported by the employee's own testimony at hearing. (Self-insurer Brief, 16-17.)

> 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.

G.L. c. 152, § 35D(1)(emphasis added). Since the employee's "actual earnings" from a job that he was capable of performing were sufficient to bar him from receiving incapacity benefits, there was no need for the judge to analyze the "suitability" of the job under subsections (3) and (5) of § 35D.

Accordingly, because the judge's denial of benefits was adequately supported by subsidiary findings of fact, which in turn were supported by the record evidence, we affirm the decision. See Zucchi's Case, 310 Mass. 130, 132-133 (1941).

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: September 22, 2000

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William A. McCarthy
Administrative Law Judge