COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 020044-99**

Ronald W. Haywood	Employee
U.S. Telecenters	Employer
Chubb Group	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll and Wilson)

APPEARANCES
Ronald W. Haywood, pro se, on appeal
Shannon Fitzpatrick, Esq., for the employee at hearing
Paul M. Moretti, Esq., for the insurer on appeal
Kevin P. Jones, Esq., for the insurer at hearing

LEVINE, J. The parties cross-appeal a decision in which an administrative judge concluded that the employee had sustained an industrial slip and fall accident on June 1, 1999, and awarded a closed period of § 34 benefits, along with § 30 medical benefits. We summarily affirm the decision with regard to the employee's appeal. Finding merit in some of the insurer's contentions, we recommit the case for further findings.

The employee began working as a telemarketer for the employer on May 10, 1999, and was subject to a ninety-day probationary period. On May 28, 1999, the employee was warned that his attendance and job performance needed to improve. A few days later, the employee slipped and fell on a wet floor in the employer's men's room. The employee was taken to the hospital by ambulance; he has not worked since that time. On June 7, 1999, the employee's treating physician, Dr. Courville, found the employee to be partially disabled due to his symptoms that were consistent with a soft tissue injury to the cervical-lumbar spine. (Dec. 3-4.) A month later, Dr. Courville diagnosed the employee with an exacerbated pre-existing spondylolisthesis at L5-S1 due to his fall at work. He opined that the employee was disabled from repetitive sitting, bending and lifting until

August 9, 1999. Then, on July 19, 1999, Dr. Courville reported that, at the time of the July 6 examination, the employee was totally disabled from full time work as a telemarketer, but noted that the employee could perform part-time sedentary work, with sitting and standing modified to avoid lower back pain. A neurologist who examined the employee in late July and August 1999, found the employee to be disabled and unable to return to work. The insurer's examining neurologist concluded, as a result of his September 2, 1999 examination, that the employee could return to work with no restrictions. (Dec. 4-5.)

The insurer opposed the employee's claim for workers' compensation benefits. The claim was denied at conference. (Dec. 2.) The employee underwent an impartial medical examination on October 22, 1999. (Dec. 5.) See § 11A(2). The impartial physician found no evidence of any significant injury, many discrepancies in the employee's physical examination, and opined that the employee was capable of work in a sedentary job which included flexibility in standing, sitting and walking. (Dec. 6.)

The judge was "persuaded that the employee injured his neck and back when he fell" at work on June 1, 1999. She found that the injury aggravated his underlying medical condition. (Dec. 6.) The judge allowed the parties to introduce their own medical evidence to address the "gap" period of disability between June 1, 1999 and the impartial examination on October 22, 1999. (Dec. 2.) The judge adopted the impartial physician's opinion, and concluded that the employee could return to work as of the October 22, 1999 impartial examination. (Dec. 6-7.) The judge further concluded that the "weight of the [medical] evidence show[ed that] the employee was not able to return to work between the date of injury and the date of the impartial medical examination." (Dec. 7.) As a result, the judge awarded the employee § 34 temporary total incapacity benefits for that period of time, along with § 30 medical benefits for treatment of the diagnosed condition during the same period. (Dec. 13.)

The insurer argues that the judge's findings were insufficient as to the issue of liability for the alleged industrial accident. We agree that the decision does not clearly describe the issues that were in dispute at the hearing. Instead, the judge poses the

questions, "Is the employee entitled to benefits under § 34?" and "Is the employee entitled to benefits under § 35?" Recently, we recommitted a decision with the identical format because we could not determine both whether the decision recognized that liability was an issue in dispute and whether the decision made findings on that issue. See Johnson v. J.C. Madigan, Inc., 16 Mass. Workers' Comp. Rep ___ (February 19, 2002). See also c. 152, § 11B ("Decisions . . . shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each decision"). Despite shortcomings in the present decision, we are satisfied that the decision is adequate. In addition to making findings describing how the accident occurred, (Dec. 4), the judge explicitly concluded that she was "*persuaded* " that the employee suffered an injury that occurred in the course of, and arose out of, his employment. (Dec. 6, emphasis added.) This demonstrates that the judge recognized that there was a dispute on liability about which she needed to be persuaded. Although the decision should have been clearer in describing the issues in controversy, the substance of the decision addresses the liability issue. Johnson, supra at ___ ("We do not elevate form over substance").

The insurer also argues that the judge's findings on the medical evidence are imprecise and fail to articulate the bases on which the judge determined that the employee was entitled to § 34 benefits for the entire period from June 1, 1999 until October 22, 1999. We have set out above a summary of various physicians' opinions given during that period of time. We agree that the judge's summary reference to the "weight" of the medical evidence, (Dec. 7), falls short of the specificity that is required for subsidiary findings to adequately support her general findings. See Lemanski v. LaFreniere's Driveway Constr., 8 Mass. Workers' Comp. Rep. 22, 24 (1994). The several doctors gave differing opinions on disability at various points in time between June 1, 1999 and October 22, 1999. As a result, we cannot tell if the judge applied the correct principles of law in reaching her conclusions on the employee's incapacity status. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). We recommit the case for further findings on the medical evidence that the judge found persuasive and on how those findings support her conclusion on the disputed issue of

extent of incapacity. See Penta v. Doherty Lumber, 5 Mass. Workers' Comp. Rep. 68, 69-70 (1991).

The insurer additionally argues that the judge failed to make findings on whether the employee's industrial injury was "a major cause," see § 1(7A), of the employee's disability during the gap period. Satisfaction of the § 1(7A) "a major cause" requirement was disputed by the parties at the hearing. (See the parties' written closing memoranda submitted to the administrative judge.) Since the judge made no findings on the issue, on recommittal she should address it. See Robles v. Riverside Mgmt. Inc., 10 Mass. Workers' Comp. Rep. 191, 195-96 (1996). Compare, e.g., Dr. Courville's July 16, 1999 opinion -- that the fall was "the major, but not necessarily the only, cause of his present disability," (Employee Exhibit 5), -- with the September 2, 1999 opinion of Dr. Sabra -- that the employee "has had a chronic low back condition since the mid 80's for which he is on disability. The current accident has not caused any objective changes as seen on his exam and the x-ray of his lumbar spine." (Insurer Exhibit 9.)

Finally, the insurer argues that the judge failed to make any findings on its written job offer of June 29, 1999, Insurer's Exhibit 3, which it contends was within the medical restrictions imposed by Dr. Courville, whose June 7, 1999 report was appended to the job offer. The job offer reflects the requirements of § 35D(3), which provides that the earning capacity of the employee be equal to:

> The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it. The employee's receipt of a 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 earnings capability under this clause.

We agree with the insurer that recommittal for findings of fact regarding the job offer is warranted. See Gulla v. Grieco Bros., Inc., 14 Mass. Workers' Comp. Rep. 300, 302 (2000); Cassidy v. Sodexho USA, 14 Mass. Workers' Comp. Rep. 42 (2000).

Accordingly, we recommit the case for further findings consistent with this opinion.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Filed: **May 21, 2002**