COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS.:** 046978-05 042793-05 047275-05

Ruben Guzman	Employee
ACT Abatement Corporation	Employer
Commerce & Industry Insurance	Insurer
Emanuel Corporation	Employer
Commerce & Industry Insurance	Insurer
ACT Abatement Corporation	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Horan)

This case was heard by Administrative Judge Preston.

APPEARANCES

Gary W. Orlacchio, Esq., for the employee
Craig Russo, Esq., for Commerce & Industry Ins. (ACT Abatement Corp.)
Diane Cole Laine, Esq., for Commerce & Industry Ins. (Emanuel Corp.)
Judith A. Atkinson, Esq., for the Workers' Compensation Trust Fund

COSTIGAN, J. Commerce & Industry Insurance, the insurer of ACT Abatement Corporation, (hereinafter Commerce/ACT), appeals from an administrative judge's decision ordering it to pay the employee ongoing weekly incapacity benefits. Commerce/ACT maintains the judge erred by 1) vacating a stipulation as to average weekly wage, 2) awarding the employee's attorney an enhanced fee of $17,000, and 3) finding the employee totally incapacitated. For the reasons that follow, we agree the judge erred by disregarding the stipulation and finding a new average weekly wage, without notice to the parties. Therefore, we vacate the average weekly wage determination and recommit the case for further evidence and findings on that issue. We affirm the decision as to the award of an enhanced legal fee and the finding of total incapacity.

Ruben Guzman, twenty-five years old at the time of hearing, left school in Guatemala at the age of fifteen and emigrated to the United States approximately two years later. Since arriving in this

country, he has worked as a cake baker and asbestos worker. He can read and write Spanish, but is not fluent in English. On September 9, 2005, while carrying a bag of asbestos debris up a ladder, the employee slipped and injured his back. He was out of work for a week, and then returned to lighter work sweeping and cleaning. He left work in mid-December 2005, due to continuing pain and limitations. (Dec. 4-5.)

At the time of his injury, the employee was working alternately for Emanuel Corporation, a non-union employer, and ACT Abatement Corporation, a union employer.[1] (Dec. 6.) The employee initially filed a claim against Commerce and Industry Insurance, as the insurer of Emanuel Corporation (hereinafter Commerce/ Emanuel). (Employee's claim dated 1/12/06.)[2] Following a § 10A conference, a different administrative judge ordered Commerce/Emanuel to pay § 35 weekly partial incapacity benefits commencing on December 16, 2005. Commerce/Emanuel appealed to a de novo hearing, prior to which the judge allowed the employee's motion to join a second claim against Commerce, as the insurer of ACT Abatement Corporation. Commerce/ACT maintained that ACT was uninsured at the time of employee's injury, and moved to join the Workers' Compensation Trust Fund. That motion was allowed. (Dec. 2.)

On July 17, 2006, Dr. Victor Conforti conducted an impartial medical examination of the employee pursuant to § 11A. His report and deposition testimony were admitted into evidence. Deeming the medical issues complex, the judge sua sponte allowed the parties to submit additional medical evidence. (Dec. 3.) The employee submitted records of his treating physician, Dr. Vladan Milosavljevic, and the insurer submitted a report from Dr. Richard Warnock. (Dec. 6-7.) The judge adopted the essentially consistent opinions of all three physicians, (Dec. 6-8), with specific emphasis on Dr. Conforti's opinion that the employee has herniated discs at L4-5 and L5-S1 with right leg radiculitis consistent with L5 neuropathy, and that he cannot perform his previous job because of his inability to continuously lift, bend, stoop, climb or kneel. (Dec. 7-8.) Crediting the employee's testimony as well, the judge found the employee had been "partially

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[1] The employee testified that both companies have the same address, are run by the same people, and use the same workers. On Fridays, he would receive a sheet indicating where he would work the following week. (June 7, 2007 Tr. 11-12.) The judge found the employee was "shuffled by the likely same management team between" the two companies. (Dec. 6.)

[2] We take judicial notice of documents in the Board file. Rizzo v. M.B.TA., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

disabled since September 9, 2005 but completely incapacitated from performing all work of a non-trivial remunerative nature on and after December 16, 2005," due to his lack of transferable vocational skills and English language skills, in combination with his physical restrictions. (Dec. 8.) The judge noted the employee's "debilitating low back and leg pain need to be addressed, and surgery may be necessary." Id.

The judge found the employee was working for ACT, not Emanuel, on September 9, 2005, and that ACT was insured by Commerce on that date.[3] (Dec. 6.) He further noted that, "[t]he parties proposed a stipulation" that "[t]he Employee's average weekly wage is $450.00 if he was employed with ACT Abatement Corporation." (Dec. 4.) However, the judge continued:

> I do not accept this stipulation and refuse to be bound to this proposed agreement which is in direct conflict with facts that I have found following the hearing. I find that the Employee was paid $25.00 per hour and worked at least 40 hours per week and earned $1[,]000.00, which is the average weekly wage. The parties did not present any persuasive documentary or other testimonial evidence to controvert the credible testimony of the Employee.
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> I decline to accept a lesser figure than what is grounded in the testimonial evidence I adopt. To do otherwise, would be penalizing the Employee and treating his claim unjustly. I am confident that the parties do not want an inadvertent proposed stipulation to work a hardship on the Employee in the event he prevails in this claim.

Id.

The judge ordered Commerce/ACT to pay § 35 benefits from September 10, 2005 through December 15, 2005 (during which period the employee worked light duty), based on an average weekly wage of $1,000 and an earning capacity to be determined by the employee's actual earnings from ACT and Emanuel. (See Ex. 8.) The judge ordered the insurer to pay weekly § 34 benefits of $600, based on the $1,000 average weekly wage he found, from and after December 16, 2005. (Dec. 9.) In addition, the judge sua sponte awarded employee's counsel an enhanced legal fee of $17,000 due to the "numerous status conferences, motion conferences and scheduled hearings as a result of the obfuscation of the facts by the Employers and Insurers." The judge

[3] In fact, at the end of the first day of testimony, the judge allowed a motion to dismiss the Workers' Compensation Trust Fund from the hearing. (April 24, 2007 Tr. 27.)

estimated employee's counsel performed four to five times the usual amount of legal work on the case, and expended over one-hundred hours in litigating the claims. (Dec. 10.) We address the insurer's arguments on appeal.

The Average Weekly Wage Stipulation

Commerce/ACT argues the judge erred by refusing to accept the stipulation of the parties as to average weekly wage. Alternatively, it contends that even if the judge properly overrode the stipulation, his findings on average weekly wage were not based on the evidence. Commerce/ACT maintains that, had it known the judge was not going to abide by the parties' stipulation, it had evidence, including the testimony of a witness, it was prepared to present on the issue of average weekly wage. (Ins. br. 3-4, n.6.) The employee counters that the judge did have the authority to vacate the stipulation, and furthermore, that the evidence submitted at hearing supported the judge's finding as to the employee's average weekly wage of $1,000.

"Both appellate and trial courts have the power to 'vacate a stipulation made by the parties if it is deemed improvident or not conducive to justice.' " Crittenton Hastings House of the Florence Crittenton League v. Board of Appeal of Boston, 25 Mass. App. Ct. 704, 712 (1988), quoting Loring v. Mercier, 318 Mass. 599, 601 (1945). See also Malone v. Bianchi, 318 Mass. 179, 182 (1945)(judge did not err in discharging stipulation on ground it did not "tend to the doing of justice"). Here, the judge found that the stipulation as to average weekly wage would result in an injustice to the employee because it contravened the employee's testimony, which the judge credited. (Dec. 4.) The insurer correctly argues, however, that the judge's findings the employee earned $25 per hour and worked at least forty hours per week do not accurately reflect that credited testimony. (Dec. 4.) The employee actually testified that he typically worked eight hours per day earning $15 per hour from ACT and less from Emanuel, and that he sometimes received overtime. (June 7, 2007 Tr. 15-16.)

Thus, although the judge misstated the employee's testimony on average weekly wage, his determination was correct that it could support a different average weekly wage than that to which the parties stipulated. Moreover, the ACT Payroll Check Register for the period 9/1/05 to 12/31/05, (Ex. 8), reflects yet a different hourly rate -- $23.80 -- and a potentially different average weekly wage than established by either the employee's testimony or the stipulation. Although neither the employee's testimony nor the payroll register is necessarily irreconcilable with the stipulation, they cannot be reconciled on the record before us. Particularly since the stipulation contained no explanation as to how the $450 average weekly wage figure was

calculated,[4] we think it was within the judge's discretion to vacate the stipulation as not conducive to justice. See Huard v. Forest Street Housing, Inc., 366 Mass. 203, 208 (1974)(court affirmed lower court's decision that "justice would best be served" by setting aside stipulation, which omitted seemingly significant information, and allowing additional evidence); Francesconi v. Planning Board of Wakefield, 345 Mass. 390, 394 (1963)(court discharged stipulation to permit fuller development of facts). Cf. Crittenton Hastings House, supra (stipulation which was product of careful negotiation was erroneously discharged where not improvidently made; discharge not conducive to justice as evidence before judge was not inconsistent with stipulation).

That said, it was not within the judge's discretion to discharge the stipulation and fix a new average weekly wage without notifying the parties and providing them an opportunity to submit further evidence. See Huard, supra (after stipulation vacated, case remanded for additional evidence). Given the parties' stipulation, the insurer had no reason to think any evidence on average weekly wage, including the employee's testimony, was being considered by the judge, and therefore, it had no reason to submit evidence on that issue. By vacating the stipulation without notice, and making findings on an issue the parties considered resolved, the judge essentially violated the due process rights of the insurer (if not the employee) to know the evidence against it and to have the opportunity to rebut that evidence. See Haley's Case, 356 Mass. 678, 681-682 (1970); Anderson v. Lucent Technologies, 21 Mass. Workers' Comp. Rep. 93 (2007). As we have stated:

> A judge must consistently provide the parties with a reasonable opportunity to respond to any material change in the circumstances. When such vigilance does not prevail, due process violations frequently -- if not necessarily -- result.

Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4 (2005); see also, Babbitt v. Youville Hospital, 23 Mass. Workers' Comp. Rep. ____ (June 23, 2009) (violation of due process for judge to effectively change his ruling as to § 11A inadequacy without notice to parties before decision filed); Godinez v. Perkins Paper Co., Inc., 22 Mass. Workers' Comp. Rep.

[4] Commerce/ACT states in its brief that the stipulation was entered into after the parties reviewed the employee's wage records in detail. (Ins. br. 3, n.3.) However, since the employee worked for two at least nominally different employers, it would be important to know on which wage records this stipulation was based. See Duran v. William Walsh, Inc., 22 Mass. Workers' Comp. Rep. 67 (2008)(average weekly wage calculated from all employee's jobs for different moving companies in twelve months before his injury); Sylva's Case, 46 Mass. App. Ct. 679 (1999)(substantial intermittent employment may be considered concurrent employment for purpose of determining average weekly wage).

83, 86-89 (2008)(insurer's due process rights violated when judge, over its objection, admitted employee's late additional medical evidence without notice to parties before decision filed). Such was the case here.

"[T]he primary goal of the act is wage replacement." Sellers's Case, 452 Mass. 804, 808 (2008), quoting McDonough's Case, 448 Mass. 79, 83 (2006). Correctly establishing an employee's average weekly wage is essential to accomplishing this goal. The judge here was acting in pursuit of that goal when he vacated the stipulation as to average weekly wage and, under the circumstances presented, did not exceed his authority. However, because he did not notify the parties he was doing so, we must vacate, on due process grounds, the judge's finding that the employee's average weekly wage was $1,000. We recommit the case for the submission of additional evidence and for further findings on the issue of average weekly wage.

The Enhanced Legal Fee

The judge explained his sua sponte award of a $17,000 hearing fee[5] under § 13A(5):

> I have sua sponte enhanced the legal fee, because through no fault of the Employee, his counsel was required to prepare for and be present for numerous status conferences, motion conferences and scheduled hearings as a result of the obfuscation of the facts by the Employers and Insurer. His persistent ongoing legal efforts were needed to present a meritorious claim for this Employee, given the muddled factual morass thrown up by the Insurer and the Employers . He performed 4 to 5 times the usual, necessary legal work in preparation for the hearings and motion conferences and has earned this fee. I calculate that he expended in excess of 100 hours in required litigation of these claims. His necessary costs are additional.

(Dec. 10.) It is well-established that,

> [g]enerally, a determination that an increased fee is due is a discretionary ruling with which we will not interfere, DiFronzo v. J.F. White/Slattery/Perini Joint Venture, 15 Mass. Workers' Comp. Rep. 193, 197 (2001), as long as the judge makes findings consistent with his statutory authority to award such an enhanced fee. Thompson v. Sturdy Memorial Hosp., 13 Mass. Workers' Comp. Rep. 427, 429 (1999).

[5] On the filing date of the judge's decision, the statutory hearing fee under § 13A(5) was $4,925.03. The statute further provides, however, that "[a]n administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney."

Mulkern v. Massachusetts Tpke. Auth., 20 Mass. Workers' Comp. Rep. 187, 200 (2006). We agree with the insurer that some of the statements made by the judge to support his increase of the fee by almost 350 per cent smack of a punitive motive, which is improper:

> Any decision to award an enhanced hearing fee should be grounded in the record evidence and based on specific factual findings about the complexity of the hearing dispute or the effort expended by the attorney at hearing. See G. L. c. 152, § 13A(5). Section 13A(5) does not authorize use of an enhanced legal fee to punish conduct. The remedy for an unreasonable defense is provided solely by G. L. c. 152, § 14(1).[6]

Sylvester v. Town of Brookline, 12 Mass. Workers' Comp. Rep. 227, 232 (1998). However, there were two days of hearing, a medical deposition, and several motion sessions and status conferences which required employee's counsel's appearance. The judge was in the best position to assess the time and effort expended by employee's counsel in advancing the employee's claim. Castricone v. Mical, 74 Mass. App. Ct. 591, 603 (2009).[7] We will not second-guess his determination in that regard, and affirm the award of the enhanced fee.

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[6] Section 14(1) provides, in pertinent part:

> Except as provided in subsection three, if any administrative judge or administrative law judge determines that any proceedings have been brought, prosecuted, or defended by the insurer without reasonable grounds:
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> (a) the whole cost of the proceedings shall be assessed upon the insurer; and
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> (b) if a subsequent order requires that additional compensation be paid, a penalty of double back benefits of such amount shall be paid by the insurer to the employee.

[7] Addressing the propriety of a c. 93A fee award, the Appeals Court stated:

> An evidentiary hearing is unnecessary in the case in which the fee judge has served as the trial judge and observed directly the quality and quantity of counsel's preparation and skill. That "firsthand knowledge" enables the judge to assess the objective worth of the legal services rendered. Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 630-631 . . . (1978). The trial judge "is in the best position to determine how much time was

The Employee's Incapacity

The insurer argues the judge erred in awarding § 34 total incapacity benefits from and after December 16, 2005, because all three medical experts agreed the employee was only partially disabled, and because the employee admitted he would have continued to work light duty with his employer, if it had remained available to him. The insurer's argument is off the mark.

The terms "incapacity" and "disability" are words of art in the Massachusetts workers' compensation system. Medley v. E. F. Hauserman Co., 7 Mass. Workers' Comp. Rep. 97, 99 (1993). "[Incapacity] combines the elements of physical injury or harm to the body, the medical element, and loss of earning capacity traceable to the physical injury, the economic element." Blakely v. Jan Cos. (Burger King), 10 Mass. Workers' Comp. Rep. 219, 220 (1996). "[M]edical disability and work capacity are distinct concepts married generally through examination of vocational factors[.] Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 172 (1995).

Txicanji v. Stop & Shop, 21 Mass. Workers' Comp. Rep. 99, 101 (2007). Moreover, a judge's belief of an employee's complaints of pain may provide a basis for finding total incapacity in the face of even unanimous medical opinion of only partial disability. MacEachern v. Trace Constr. Co., 21 Mass. Workers' Comp. Rep. 31, 36 (2007). See also, Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 370 (2005), citing Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65, 68 (1990).

Here, the judge adopted Dr. Conforti's opinion that the employee physically could not perform his previous job because of his inability to continuously lift, bend, stoop, climb or kneel. (Dec. 7-8.) He credited the employee's testimony concerning his "debilitating low back and leg pain." (Dec. 8.) He found the employee had,

> no transferable vocational skills and no measurable level of English language skills to perform any sedentary/light duty job. He is motivated to work, but unless retrained, he is left on the sidelines. His limitations are profound and overwhelming. He is incapable of

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> reasonably spent on a case, and the fair value of the attorney's services." Fontaine v. Ebtec Corp., 415 Mass. 309, 324 . . . (1993).

Castricone, supra at 603.

> sustained lifting, bending, standing, sitting, climbing, stooping or kneeling. He does not drive and remains out of the world of work through this hearing.

(Id.) The insurer contends the judge ignored the employee's "relevant testimonial evidence" that he thought himself able to return to light duty work. (Ins. br. 8.) In fact, as to the light duty job he performed for Emanuel from September to December 2005, the employee testified he stopped that job because "they didn't have any more jobs for me," that physically, he "was all bad" at that time, and that he had not worked since "[b]ecause there is no job I can do what I used to do before." (June 7, 2007 Tr. 25.) Having found the employee's "work ethic was unquestioned," (Dec. 5), the judge probably was not surprised the employee testified he would have continued working the light duty job with Emanuel, had it not ended, (June 7, 2007 Tr. 46), or that he applied for a lighter job packing coffee cakes, a position he once held but which was no longer available. (Id. at 51-53.) However, the judge was not, as the insurer posits, bound by the employee's optimistic view of his own work capacity. Based on the medical evidence he adopted, the thorough vocational analysis he performed, and his assessment of the employee's credibility, the judge found the employee was "completely incapacitated from performing work of a non-trivial remunerative nature on and after December 16, 2005." (Dec. 8.) We see no error.

Accordingly, we affirm the judge's award of § 34 benefits and the award of the enhanced legal fee under § 13A(5) against Commerce/Act. We also affirm the judge's denial and dismissal of the employee's claims against Commerce/Emanuel and the Trust Fund. (See footnote 3, supra.) However, because the judge rejected the stipulation of the parties as to the employee's pre-injury average weekly wage, without giving them notice and the opportunity to be heard on the issue, we recommit this case to the judge for further proceedings and additional findings of fact consistent with this opinion.

Because the employee has prevailed on two of the three issues argued by the insurer on appeal, pursuant to G. L. c. 152, § 13A(6), we direct Commerce/Act to pay employee's counsel a fee of $1,495.34.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: September 10, 2009