COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 096391-88**
Sandra Haggerty	Employee
Sears Roebuck & Co.	Employer
Allstate Insurance Co.	Insurer

AMENDED REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll and Levine)

APPEARANCES
William H. Murphy, Esq., for the employee at hearing
Paul M. Moretti, Esq., for the employee on brief
David M. O'Connor, Esq., for the insurer at hearing and on the brief
Joseph C. Abate, Esq., for the insurer on brief

MAZE-ROTHSTEIN, J. This case is before the reviewing board on the employee's appeal from a decision awarding her one week of § 34 temporary total incapacity benefits due to a work related exposure to toxic chemicals. In seeking reversal, the employee argues that the decision is arbitrary, capricious, contrary to law and based on findings which are conflicting, confusing and insufficient. The arguments have merit. We reverse the decision and recommit the case for further findings. G.L. c. 152, § 11C.

Sandra Haggerty, now in her late thirties, is a high school graduate who has previously worked as a waitress, food handler and payroll clerk. She began work for the employer as a warehouse laborer in 1980. In 1984 she became a "gas technician," servicing and repairing small gas engines. (Dec. 5.) At the time of her injury, she earned $600 per week. (Dec. 2.) On March 25, 1988, while at work, she experienced nose

irritation and a headache after exposure to noxious fumes.[1] (Dec. 5.) She left work at lunchtime to see a doctor, who x-rayed her lungs and irrigated her nose. The x-rays were negative, and she was sent home with medications and instructions to use an inhaler. (Dec. 5.) The following day Ms. Haggerty was hospitalized because of difficulty breathing. On March 30, 1988, after four days in the hospital, she was discharged with a diagnosis of acute asthma. (Dec. 6.)

The employee returned to work on Friday, April 1, 1988. (Dec. 6.) She worked for approximately six more months at her regular job in the gasoline engine shop. During this time, she missed approximately 28 days of work. On October 12, 1988, as a result of these absences, she was placed in an "attendance improvement program." The next day, she stopped working and sought treatment from Harvard Community Health Plan (HCHP) for "mood swings." A few days later, she returned to her health plan with complaints relating to her asthma. (Dec. 6.) By October 24, 1988, she reported feeling better, but her doctor gave her a note authorizing three more days absence from work. She did not return to work at the end of that time. On November 24, 1988, Ms. Haggerty went to HCHP with respiratory complaints. (Dec. 7.)

The employee received "sickness leave pay" from the middle of October 1988 until early February 1989. Id. Thereafter she collected unemployment compensation from June 16, 1989 to April 7, 1990. During this period she received training in computers and telecommunications. From August 20 to October 27, 1990 she worked for Nynex where she earned $334.00 per week. She then sold Tupperware for six weeks. At the time of the hearing she was working in a day care center. Id.

The employee filed a claim for one week of § 34 temporary total incapacity benefits and ongoing § 35 partial incapacity benefits alleging a diminution in her ability

[1] Though the judge did not detail how the industrial accident occurred, the parties agree that she was at a sink cleaning out a gas tank when she began to experience pain in and bleeding from her nose, followed by breathing difficulty and a headache. (Employee brief 2; Insurer brief 2.) There is undisputed evidence that a co-worker had put battery acid and bleach down the sink drain the previous evening causing a noxious chemical reaction. (Tr. 108-110, dated June 13, 1991.) (Hereinafter Tr. II.)

to earn due to the exposure to toxic chemicals in the course of her employment. The insurer did not accept the claim. Following a § 10A conference denial of her claim, the employee appealed to a hearing *de novo*. (Dec. 4.)

In support of her medical case, the employee submitted HCHP records, in-patient treatment hospital records, one report from Dr. Howard Hu and the four reports of Dr. Lewis Pepper. The insurer relied on the report of Dr. Bartolome Celli. (Dec. 2-3.)[2] Dr. Pepper, a specialist in occupational and preventive medicine, diagnosed the employee as having underlying hyperactive airways. He opined that the March 25, 1988 exposure had aggravated her underlying asthmatic condition and concluded that further exposure to that environment would continue to aggravate her condition. (Dec. 8, 9; EE. Ex. 5.) Dr. Hu, an environmental health specialist, felt the employee's asthmatic condition was sufficiently worsened by the chemical work exposure to warrant her remaining out of work. (Dec. 8; EE. Ex. 4.) Dr. Celli found the employee precluded from return to work environments like that of her job with the employer, but not currently medically disabled based on his review of two sets of pulmonary function tests performed in March 1988 and in November 1990. Dr. Celli opined that those tests revealed normal lung function with findings of small airway disease, consistent with an asthma diagnosis. (Dec. 8, 9; Ins. Ex. 3.)

In his decision, the administrative judge found that the employee had sustained a compensable aggravation of her pre-existing asthma[3] in the course of her employment on

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[2] This case was not subject to the provisions of G.L. c. 152, § 11A, as the conference in the matter was heard before the July, 1992 implementation date of that provision.

[3] Though the judge had made no prior reference to any pre-existing condition, the employee testified that she had been treated for asthma while attending summer camp as a child, but had been asymptomatic since then. (Tr., 8, dated January 30, 1990 [hereinafter Tr.I]; Employee Ex. 4.) The employee's theory of the case was that her regular exposure to gasoline, aerosols, paints, oil, solvents and battery acid up to1984, caused her to experience breathing difficulties and coughing at work during that year. She then sought medical attention and was given oral medication and an inhaler. (Tr. I, 13-15; Tr. II, 4.) Her symptoms worsened with pregnancy, and she was transferred to a telemarketing job where she remained until her maternity leave in early July 1986. (Tr. I, 17). While out on maternity leave, her breathing normalized. (Tr. I, 18).

March 25, 1988 and ordered the insurer to pay § 34 benefits from March 25, 1988 to March 31, 1988. He based this finding of total disability on the opinion of Dr. Pepper. The judge found the employee thereafter not "disabled." (Dec. 9.) He stated that he adopted in part the medical opinions of Drs. Celli and Pepper. He also relied on the employee's post March 31, 1988 work history. (Dec. 9.)

On appeal, the employee argues that the finding of no present medical disability is unsupported by the evidence. We agree. The medical opinions do not support the judge's finding of no present medical disability.[4]

Compensation is not awarded for the injury per se but rather for the diminished earning capacity that results therefrom. L. Locke, Workmen's Compensation § 321, at 375-376 (2d ed. 1981). "Where an employee has a condition that a work injury has made symptomatic such that medically he should refrain from certain prior work because of the considerable risk of reinjury, any reduced capacity to earn from such a restriction is compensable." Smedberg v. All For A Dollar, 11 Mass. Workers' Comp. Rep. 540, 542 (1997). See also Ladouceur v. R.A. Wilson Elec. Contractors, 9 Mass. Workers' Comp. Rep. 612 (1995). Here, both doctors, whom the judge adopted, were of the opinion that Haggerty has a residual medical disability via a heightened susceptibility to aggravations of her condition if exposed to irritating agents. Thus, the work injury restricted her from

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When she returned to her regular gas technician duties in February 1987, she testified, her respiratory problems returned, and she once again needed to rely on medication. (Tr. I, 18.) However, the causation standard applicable to the employee's 1988 date of injury is that of simple contributing cause. See Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 195 (1996). Thus, interaction of the work injury with her preexisting condition only becomes relevant, if at some point the work injury effects abate entirely.

[4] Both physicians adopted by the judge agreed that the March 25, 1988 exposure incident aggravated the employee's underlying asthma condition. (Insurer Ex. 3; Employee Ex. 5.) Moreover, both doctors agreed that she was disabled from her prior occupation. Dr. Pepper opined that continued work in the such an environment would place the employee in medical jeopardy. (Employee Ex. 5.) Dr. Celli further stated "asthmatics in general and more so, in Ms. Haggerty's case, should not be exposed to irritating agents." (Insurer Ex.3.) Dr. Celli opined that she "cannot perform the type of job at which she was working. If she is to re-enter the work force, she needs to do so in a different environment." (Insurer Ex. 3.)

performing work in certain types of environments.

A judge must determine an employee's incapacity for work by assessing the medical evidence, together with consideration of the employee's age, education, experience and training. Frennier's Case, 318 Mass. 635, 639 (1945). "The goal of [incapacity] adjudication is to make a realistic appraisal of the medical effect of a physical injury on the individual claimant and award compensation for the resulting impairment of earning capacity . . . ." Scheffler's Case, 419 Mass. 251, 256 (1994). Further, a "finding of partial incapacity is warranted where an employee, under competent medical advice, refrains from engaging in [her] former work because of the considerable risk of reinjury, and pursues less remunerative work in order to avoid that risk." Dimitropoulos' Case, 343 Mass. 341, 345 (1961).

As it stands, the decision lacks any finding showing that the employee is able to earn $600.00 per week since severing her employment with Sears. Haggerty's earnings since she left the employer do not support a finding of no incapacity. As a gas technician Haggerty earned $600.00 per week. (Dec. 2.) Since leaving Sears her highest wage was $334.00 each week for the ten weeks she worked at Nynex. (Dec. 7.) Although she earned her pre-injury wage from April 1, 1988 to October 15, 1988 from continued work at Sears as a gas technician, Drs. Celli and Pepper, whose opinions the judge adopted in part, both opined that the employee should not return to such work. See note 4 supra. Given the findings made, we are at a loss as to how the judge determined the employee's earning capacity equaled her former average weekly wage. See G.L.c. 152, § 35D(1)-(5).

Where the findings of the judge are so insufficient that we are unable to determine if correct principles of law have been applied, recommittal is appropriate. See Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993); Antoine v. Pryotector, 7 Mass. Workers' Comp. Rep. 337, 341 (1993). However, since the administrative who rendered the decision no longer serves in the department, we reverse the decision and forward the case to the senior judge for assignment to a new administrative judge for a hearing *de novo*.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: February 1, 1999.