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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 043475-98**

Stephen A. Almada	Employee
Central Concrete Corp.	Employer
Travelers Insurance Co.	Insurer

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

APPEARANCES
Frederick Homan, Esq., for the employee at hearing
Nicole D. Sullivan, Esq., for the employee at hearing and on brief
Donald M. Culgin, Esq., for the insurer

MAZE-ROTHSTEIN, J. The employee appeals a decision awarding him a closed period of G. L. c. 152, § 34, total incapacity weekly indemnity benefits, and several closed periods of G. L. c. 152, § 35, partial incapacity benefits. As grounds, the employee argues that mischaracterization of medical evidence, and other deficits in the subsidiary findings, makes the earning capacity assignment unsound. (Employee Br. 4-7.) After a review of the evidentiary record we agree, and reverse the decision and recommit the case for further findings. See G. L. c. 152, § 11C.

Stephen Almada, the employee, was a forty-five year old, married father of two minor children at the time the decision was filed. Mr. Almada graduated from high school and spent the vast majority of his work experience as a laborer in the concrete and cement construction business. (Dec. 4.) From 1980 to 1995, he operated his own concrete construction business. In 1995, he commenced employment with Central Concrete as a cement finisher. While employed at Central Concrete, Mr. Almada occasionally performed side jobs during his off-hours. Id.

On October 6, 1998, while in the course of his employment at Methuen High School, the employee sustained an injury to his right ankle when a thirty-foot chute filled with cement jammed his ankle against a 2 foot by 6 foot form. That evening, at home, Mr. Almada treated his foot with ice. He reported to the Marlboro Hospital the next day and remained out of work for two weeks - returning on October 20, 1998. Despite his return to work, and the use of an ankle brace, the ankle remained sore. Mr. Almada requested light duty work so as to avoid exerting his ankle. (Dec. 5, 7, 8.) In November 1998, Mr. Almada was terminated from his employment at Central Concrete.[1] He received unemployment benefits and, also in November 1998, performed an independent two-day cement slab job for an automotive repair shop. During the summer of 1999, Mr. Almada worked part time for several weeks at a fabrication shop. (Dec. 4.)

In November 1998, one month after sustaining his work injury, Mr. Almada sought medical treatment from an orthopedic surgeon. He underwent a regimen of physical therapy and, in March 1999, had surgery to his right ankle. The surgical procedure was followed by more physical therapy. (Dec. 5.) In November 1999, while on a hunting trip in Maine, the employee fell and injured his left knee. Ultimately, that injury resulted in reconstructive surgery. (Dec. 4.)

Mr. Almada filed a claim seeking § 34 weekly temporary total incapacity benefits from March 3, 1999 and continuing; the insurer resisted. Pursuant to G. L. c. 152, § 10A, the matter went to conference, compensation was ordered and the insurer appealed to a hearing de novo. (Dec. 2.)

An orthopedic surgeon examined the employee pursuant to G. L. c. 152, § 11A.[2] His medical report was admitted into the evidentiary record. (Dec. 1, 5.) The doctor opined that the employee suffered from peroneal tendon injury, possible anterior talofibular ligament injury, status post peroneal tendon surgery and possible reflex

[1] The administrative judge noted that, on October 29, 1998, the employee became involved in a heated disagreement with the general contractor at a job site in New Hampshire. (Dec. 8.)

[2] General Laws c. 152, § 11A(2), requires that a statutory medical examiner be appointed when the appeal of a conference order involves a dispute over medical issues.

sympathetic dystrophy. (Dec. 5-6.) Moreover, he causally related the injury to the October 1998 work incident. The § 11A physician restricted the employee from strenuous activity and from work that would require prolonged standing, walking or heavy lifting. Finally, the doctor opined that the employee's medical disability was partial and temporary in nature and that the employee had not yet reached a medical end result. (Dec. 6.)

On March 21, 2001, by agreement of the parties, a second § 11A examination[3] was conducted by a different orthopedic surgeon. That doctor opined that the employee's right ankle exhibited a well healed scar laterally over the lateral malleolar region with some mild hypersensitivity over the scarred area. He further opined that the employee was able to stand up and ambulate for short distances every thirty minutes and that the employee had a full time "secondary" work capacity.[4] He did note, however, that the employee would not be able to return to his prior duties in the construction trade. (Dec. 7.) This medical report was also admitted into the evidentiary record.[5] (Dec. 1.)

The administrative judge adopted the medical opinions of both § 11A medical examiners and determined that the employee had suffered a work related injury to his right ankle on October 6, 1998. (Dec. 9, 10.) He also found that the employee was totally incapacitated from the date of the ankle surgery, March 5, 1999, to July 15, 1999 -- the date of the first impartial examination. The judge determined that, thereafter, the employee was partially incapacitated up to the date of the employee's hunting excursion, November 10, 1999. The judge assigned the employee an earning capacity of $270.00

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[3] While there is no right to more than one § 11A medical examination, Oliveira v. Scrub-A-Dub Wash Ctr., 10 Mass. Workers' Comp. Rep. 61, 64 (1996), the parties may elect by agreement to have another. See Pina v. LaChance, 10 Mass. Workers' Comp. Rep. 81, 82, n.1 (1996).

[4] We infer from the medical examiner's report that he inadvertently used the term "secondary" work capacity instead of the term "sedentary."

[5] As an aside, we note that the second § 11A medical opinion as to causal relationship is unclear. Nevertheless, as the insurer has not appealed the decision, we need not address that issue.

per week for that period of partial incapacity. Id. The judge specifically adopted the second § 11A medical opinion that the employee did not experience any incapacity or impairment with regard to his resolved right ankle injury as of March 21, 2001. (Dec. 10.)

Accordingly, the judge ordered the insurer to pay a closed period of § 34 total incapacity benefits from March 5, 1999 to July 15, 1999; a closed period of § 35 partial incapacity benefits from July 16, 1999 to November 10, 1999, based on an earning capacity of $270.00 per week; and a closed period of § 35 partial incapacity benefits from November 11, 1999 to March 21, 2001, based on an earning capacity of $600.00 per week. The judge also ordered the insurer to pay the employee's reasonable and related medical expenses pursuant to G. L. c. 152, §§ 13 and 30, together with a § 13A(5) attorney's fee. (Dec. 11, 12.) We have the case on appeal by the employee.

The employee raises two issues on appeal. First, he contends that the administrative judge mischaracterized the second § 11A medical opinion in finding that the ankle injury was no longer an impediment to the employee as of the date of the doctor's examination. (Employee's Br. 4.) Second, the employee asserts that the judge failed to provide adequate subsidiary findings to support his earning capacity determinations. We choose to address these issues collectively as they both speak to the employee's earning capacity.

The second § 11A doctor precluded the employee from returning to his former employment in the cement industry. As a result, argues the employee, the work related ankle injury continues to present some form of impairment to the employee. (Employee's Br. 4.) Moreover, heavy manual labor constitutes the entirety of the employee's prior work experience. Given the physical restrictions imposed by both medical examiners, permitting only sedentary employment, we do not understand the basis for the earning capacity assignments. The judge first assigned an earning capacity of $270.00 per week following the first § 11A medical examination (July 15, 1999). (Dec. 9.) This earning capacity was then increased to $600.00 per week as a result of the

employee's participation in a hunting expedition. (Dec. 9-10.) The subsidiary findings on this point are as follows:

> 13. Clearly Mr. Almada was able to go hunting in Maine in November, 1999.
>
> 14. When Mr. Almada went hunting in November 1999 his ankle injury was starting to feel better.
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> …
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> 16. Mr. Almada was capable to go to Maine on November 10, 1999 on a hunting trip and he shot a deer on that hunting trip. Two weeks later he was able to go on another deer hunting trip in Maine.

(Dec. 8.)

The judge did not expand upon the employee's "hunting" activities although he clearly relied on that fact to increase his earning capacity. These subsidiary findings as listed by the judge, without anything more, are inadequate to justify a change in the employee's earning capacity.

We concede that the employee's participation in a "hunting excursion" does summon romanticized thoughts of physical strength and agility to meet nature's challenges. Notwithstanding, without a detailed analysis of the employee's actual "hunting" activities, a reliance on such assumptions is unfounded. Had the employee testified that he dragged a felled deer across the wilderness or, better yet, over his shoulder on the heels of the "kill," we would not take issue with the increase of the employee's earning capacity as of that date. However, those are not the facts presented in this case. We recite the evidence that was available to the judge to support his finding. The employee testified on direct examination as follows:

> What was involved is really there wasn't much hunting involved. For me, I was up there to relax and enjoy myself, but I did get a hunting license. And I did walk from the car. In Maine, you can hunt from a dirt road. You can't shoot out of the vehicle. . . So what we did, my buddy drove. We parked on a dirt road. I would walk forty or fifty [yards] down the dirt road, gravel road yards, sit on the side of the road.

(Tr. I, 6-67.)[6] The employee also testified that he wore sneakers while hunting, (Tr. 67, dated April 25, 2000), and that on his second outing he tripped over landscape timber at a cabin, injuring his left knee. (Tr. I, 68-69.) On cross-examination, the employee testified:

> Well, I was about I would say 50 yards, maybe 40 to 50 yards away from the car on a dirt road. Kevin went off in the little woods and pushed the deer to make him run across the road in the open area, and I sat on the side of the road, and along it came across the road and I shot it.

(Tr. II, 46-47.) The employee testified that the 120 pound deer was tied to a rope and pulled up onto the car, with minimal assistance on his part. (Tr. II, 46-48.) The employee also testified that on the second hunting trip he did not hunt because an individual is only entitled to one deer per season. (Tr. II, 52.) During both hunting trips, when the employee was not sitting on the side of the road "hunting," he apparently spent the remainder of his time in a cabin. (Tr. II, 58.) This testimony was not countered by the insurer. While credibility of witnesses is the judge's sole province, Belleville v. Sonora Steel, 14 Mass. Workers' Comp. Rep. 259 (2000), here, the judge failed to identify what it was about the employee's "hunting" activities that supported a significant increase in earning capacity as of the date of that hunting trip. This lack of foundation requires additional findings.

On recommittal, we direct the judge to readdress each of his earning capacity findings. The judge assigned this employee a $ 600.00 per week earning capacity despite the fact that the employee cannot perform heavy, manual labor - the only work experience he has ever known. Although the judge recites the appropriate factors set out in Scheffler's Case, 419 Mass. 251, 256 (1994), i.e., the employee's age, education and vocational profile, as well as the economic realities of the job market, the decision lacks any meaningful Scheffler analysis. Nowhere in the body of the decision does the judge demonstrate how the employee's limited skills and residual physical restrictions result in

[6] There were two days of hearing, April 25, 2000 and May 8, 2000. We refer to the transcript of the first hearing date as "Tr. I," and to the second as "Tr. II."

either the initial earning capacity of $ 270.00 or the subsequent $ 600.00 per week. Finally, the judge must explain how a man, who has never done sedentary work, can now earn his former average weekly wage, despite residual work related medical restrictions, so as to justify a discontinuance of benefits.

Accordingly, the judge must set forth sufficient subsidiary findings to establish the employee's earning capacity to enable proper appellate review. See Ballard's Case, 13 Mass. App. Ct. 1068-1070 (1982)(decision must set forth conclusions adequately supported by subsidiary findings to enable proper appellate review).

The decision is reversed and we recommit the case to the judge for further findings consistent with this opinion.

So ordered.

Filed: January 22, 2003

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

SMR/lk