COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021038-01**

Stephen Borawski	Employee
Gencor Industries, Inc.	Employer
American Protection Insurance	Insurer

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

APPEARANCES
Cynthia A. Canavan, Esq., for the employee
Michael P. Mahany, Esq., for the insurer

LEVINE, J. The employee appeals an administrative judge's decision awarding a closed period of weekly G. L. c. 152, § 35, partial incapacity benefits. The employee first contends that there is no medical or vocational evidence supporting the judge's finding that the employee had an earning capacity during that time. In addition, he maintains that the case should be recommitted for additional medical evidence because he had surgery after the issuance of the administrative judge's decision. Finally, the employee challenges, for the first time on appeal, the qualifications of the impartial examiner. We summarily affirm the judge's decision as to the employee's last two arguments. For the following reasons, we also affirm the judge's decision finding the employee partially incapacitated and establishing an earning capacity.

Stephen Borawski, age fifty-two at the time of hearing, has mechanical skills acquired during automotive technical studies. In addition, he can read and understand blueprints, though he is not an engineer. Prior to 1995, he worked as a service manager and mechanic maintaining and servicing heavy equipment. Since 1995, he has been employed as an equipment manager or field service technician. As service technician, he was basically an on-site, hands on foreman, overseeing the construction of asphalt

manufacturing plants. The job is strenuous and physical, requiring climbing ladders and stairs up to eighty feet, lifting material and equipment in excess of one hundred pounds, and operating construction equipment. (Dec. 4.)

On June 10, 2001, while helping to lift a heavy motor, Mr. Borawski felt immediate burning and soreness in his mid- to low back, radiating down his legs. He sought emergency medical treatment the following day, and has been out of work since, except for two brief periods when he attempted unsuccessfully to return to work.[1] Id. An August 2001 MRI showed a protrusion with partial disc herniation at L2-3, causing an indentation on the nerve root bundle. A July 2002 MRI revealed no visible herniation. (Dec. 4; Exh. 2, § 11A report.) The employee has been out of work since August 29, 2001, because of alleged constant low back pain which interrupts his sleep and causes difficulty sitting, standing, lifting, walking and climbing. At the time of the hearing, he was not receiving any treatment, but did take medication. On November 29, 2001, he had an unrelated cervical fusion.[2] (Dec. 5.)

The insurer paid § 34 benefits for the periods the employee was unable to work until November 5, 2001. (Dec. 3.) The employee thereafter filed a claim for additional benefits. Following a conference, he was awarded § 35 partial incapacity benefits from November 6, 2001 until May 23, 2002. (Dec. 2; Tr. 6.) The case was appealed to a de novo hearing. (Employee brief 2, Ins. brief, 2.) Pursuant to § 11A, Dr. Forrest Maddix examined the employee on August 21, 2002, (Dec. 5), and his deposition was taken on December 5, 2002. (Dec. 1.) Dr. Maddix opined that there was a causal relationship between the employee's work injury to his low back and a subsequent period of

[1] The employee returned to work from June 18 until July 10, 2001, and from July 21 until August 28, 2001. (Dec. 4.) Though the judge states that the employee returned to light work, id., the employee testified that he tried to return to full duty. (Tr. 33, 36.)

[2] There is no contention that the employee's cervical condition is related to his industrial accident. Therefore, the judge properly focused on the extent of incapacity due solely to the employee's back injury. See Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 683 (1995).

incapacity. However, his findings on examination no longer supported a diagnosis of ruptured disc at L2-3, and he opined that there was no objective evidence to support the employee's subjective complaints. However, because of the unrelated surgery to the employee's cervical spine, Dr. Maddix recommended that he avoid strenuous physical activity, such as lifting over twenty pounds, climbing, and continuously being on his feet. (Dec. 5; Exh. 2, § 11A report.)

The judge found the medical issues complex and allowed the parties to submit additional medical evidence. (Dec. 2.) The employee's treating neurosurgeon is Dr. Paul Spurgas. The employee submitted his medical reports for the period October 4, 2001 to November 6, 2002. (See Dec. 1, 7; Exh. 9.) Dr. Spurgas causally related the employee's lumbar injury to his accident at work in June 2001, (Exh. 9, Dr. Spurgas report of October 4, 2001), and opined that the employee was totally disabled on the basis of that injury alone. (Dec. 7; Exh. 9, Dr. Spurgas report of January 25, 2002.)

In his decision, the judge adopted the opinion of the impartial examiner, Dr. Maddix, that the employee was not incapacitated due to his work-related lumbar injury as of the date of the impartial examination, August 21, 2002. (Dec. 6-7.) The judge found that but for the employee's unrelated cervical surgery, "he could have likely returned to his former employment . . . as his industrial injury ceased to be a causative factor in his claimed incapacity beyond that date." (Dec. 6.) He therefore awarded no benefits after August 21, 2002. (Dec. 7.) For the prior period, November 6, 2001 to August 21, 2002, the judge relied on Dr. Spurgas's opinion that the employee was disabled as a result of his industrial injury to his low back. Id. However, he "only partially credit[ed] the employee's testimony . . . that he had lumbar pain which caused difficulty in sleeping and performing household tasks and that he had to lay [sic] down during the day." (Dec. 6.) Although he believed the employee was completely incapacitated from his work with the employer between November 6, 2001 and August 21, 2002, the judge found that the employee had the capacity for other work. In the absence of expert vocational testimony, the judge assessed the employee's skills and found him capable of earning $10.00 per

hour doing full-time sedentary work, resulting in a weekly earning capacity of $400.00. (Dec. 6.)

The employee challenges the judge's decision arguing that the medical and vocational evidence does not support either the judge's finding that the employee was not totally incapacitated from November 6, 2001 to August 21, 2002, or the judge's assignment of a $400.00 per week earning capacity.

The employee argues that the judge's finding that the employee had a work capacity during the subject closed period is arbitrary and capricious because the judge did not give any reasons for rejecting Dr. Spurgas's opinion that the employee was totally disabled due to the lumbar injury alone. The employee maintains that the judge's statement that he only partially credited the employee's testimony for the period from November 6, 2001 to August 21, 2002 -- that he had lumbar pain which caused him difficulty sleeping and performing household tasks and that he had to lie down during the day -- is insufficient to explain his rejection of Dr. Spurgas's opinion on extent of disability. We disagree.

The employee is correct that the administrative judge can reject uncontradicted medical opinion only if he states adequate reasons for doing so. See Monteiro v. Nelson Cleaning Servs., 12 Mass. Workers' Comp. Rep. 147, 150-151 (1998). However, contrary to the employee's contention, the judge's disbelief of the employee's testimony as to his pain and limitations is sufficient reason for rejecting Dr. Spurgas's opinion of total disability. In Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312 (2003), we held that, just as a judge may find total incapacity based on pain despite a medical opinion of only partial disability, see, e.g., Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65, 68 (1990), so also may he find a work capacity in the face of a medical opinion of total disability. Tran, supra at 318-319. Credibility determinations, of course, must not be arbitrary or capricious. Melendez v. City of Lawrence, 16 Mass. Workers' Comp. Rep. 370, 373-374 (2002)(judge's credibility findings were arbitrary and capricious where judge failed to consider all evidence in the

record bearing on the employee's credibility). Credibility findings must be based in the record evidence or reasonable inferences drawn therefrom and pertinent to the claim. Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249-250 (2001)(deference is not given to judge's credibility determination where his expressed reasons for not crediting employee are derived from inferences not reasonably drawn from the [medical] evidence). A judge's findings on credibility must be related to one of the substantive elements of the employee's claims -- liability, causal relationship or extent of incapacity. See Frey v. Mulligan, Inc., 16 Mass. Workers' Comp. Rep. 364, 365-368 (2002)(finding that employee lacks credibility was either irrelevant, not connected to the merits of the claim, or in conflict with the judge's findings regarding the merits of the claim).

Here, the judge considered all the medical evidence, properly listing the impartial report and the additional medical evidence, (Dec. 1), discussing the impartial opinion at length, (Dec. 5-7), and relying on Dr. Spurgas's opinion that the employee suffered a work-related disability during the closed period in question. (Dec. 7.) In addition, the judge did not express any reasons for not crediting the employee which reflected improper inferences drawn from the evidence. The judge stated simply that he "only partially credit[ed] the employee's testimony for the period from November 6, 2001 to August 21, 2002 that he had lumbar pain which caused difficulty in sleeping and performing household tasks and that he had to lay [sic] down during the day." (Dec. 6.) His disbelief of the extent of the problems caused by the employee's pain was relevant to one of the substantive elements of the employee's claim, namely, the extent of his incapacity. See Frey, supra. Where the judge has considered all the evidence, and where the testimony the judge did not find wholly credible goes to incapacity, the judge's reasons for finding the employee partially incapacitated are adequately explained and are not arbitrary and capricious. See Truong, supra at 250 (example of credibility properly linked to the elements of the claim).

The employee next argues that the judge's vocational analysis is insufficient to support his conclusion that the employee can perform full-time sedentary work. We disagree.

The determination of earning capacity is a question of fact, Johnson v. J.C. Madigan, Inc., 16 Mass. Workers' Comp. Rep. 72, 77 (2002), and the judge may use his own judgment. Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988). However, he must briefly analyze how the relevant vocational factors, such as age, education, training and experience, combine to justify the earning capacity assignment. Johnson, supra at 77. See Scheffler's Case, 419 Mass. 251, 256 (1994). The judge here made findings on the employee's skills and training, which included an ability to read and understand blueprints, mechanical skills acquired during automotive technical studies after graduating from high school, and, most recently, experience as a "hands on" foreman overseeing the construction of asphalt manufacturing plants. (Dec. 4.) After only partially crediting the employee's testimony as to his pain and limitations and finding him not totally incapacitated from all work, the judge found that Mr. Borawski "has demonstrated technical, mechanical and vocational skills to perform many occupations other than his job with this employer." (Dec. 6.) In the absence of expert vocational testimony, the judge concluded that the employee was capable of earning $10.00 per hour working at a full-time adjusted sedentary job between November 6, 2001 and August 21, 2002.[3] Id. These findings satisfy the requirement that the judge conduct a "brief" vocational analysis justifying an assigned earning capacity. Compare Fortier v. Ambulance Sys. of America, 13 Mass. Workers' Comp. Rep. 442, 444 (1999)(vocational analysis inadequate where judge failed to discuss at all how employee's age, training, experience, education and physical limitations affected her ability to work, and made no credibility findings regarding the employee's testimony about complaints of pain);

[3] We note that, when the employee was asked if, discounting his pain, he was "professionally capable of performing a sedentary job, for a company such as [the employer], that would not require strenuous, physical activity," he replied "yes." (Tr. 63.)

Casagrande v. Massachusetts Gen. Hosp., 12 Mass. Workers' Comp. Rep. 137, 140 (1998)(inadequate vocational analysis where the judge failed to explain how employee, with exclusively heavy work history and physical limitations, could earn the amount assigned by the judge). In the present case, the subsidiary findings support and warrant the judge's conclusion on earning capacity. See Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993)(conclusion must emerge from the matrix of subsidiary findings). We therefore affirm the decision of the administrative judge.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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