COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 028581-99**

Stephen Johnson	Employee
J. C. Madigan, Inc.	Employer
Travelers Insurance Company	Insurer

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

APPEARANCES
James A. McDonald, Jr., Esq., for the employee
Richard W. McLeod, Esq., for the insurer at hearing
Beth R. Levenson, Esq., for the insurer on appeal

LEVINE, J. The parties cross appeal from a decision in which the administrative judge awarded the employee a closed period of total incapacity benefits pursuant to § 34; ongoing partial incapacity benefits pursuant to § 35; §§ 13, 30 benefits; and attorney's fees and costs. The insurer contends that the judge erred by apparently failing to address the issue of liability in her decision. We agree. The employee argues that the judge failed to perform a proper vocational analysis. This argument also has merit; therefore, we recommit the case for further findings. G. L. c. 152, § 11C.

The employee claimed workers' compensation benefits for an alleged July 21, 1999 neck injury. Following a § 10A conference, an administrative judge ordered § 34 temporary total incapacity benefits. The insurer appealed to a de novo hearing. (Dec. 2.)

The judge's decision after hearing includes the following findings of fact. The employee, at the time of hearing, was forty-five years old, married and had a ninth grade

education. (Dec. 2-3.) His work history included driving and loading trucks, freight handler and, at the time of the alleged injuries, salesman of truck equipment. (Dec. 3.) In 1992, the employee went to work for the present employer. His duties included delivering truck equipment; this required the employee to lift and move heavy items on and under trucks. Id.

The judge found that in January 1999 the employee injured his neck while delivering a snowplow; the employer paid the employee his regular wage while he was out of work for six or seven weeks. The judge further found that on July 21, 1999, the employee injured his neck again while moving a fender out of the way to retrieve a serial number from a sander. (Dec. 3, 5.) The employee did not report this injury to the employer until July 27, 1999; however, he did report it to his family doctor on July 23, 1999; that doctor found that the employee was unable to work "indefinitely" and diagnosed a cervical disc problem. (Dec. 3.) After consultation with a neurosurgeon, on December 13, 1999, the employee underwent anterior cervical microdisectomy/fusion and plate. (Dec. 4.)

Pursuant to § 11A of the act, an impartial physician, Dr. Gardner, examined the employee. (Dec. 4.)[1] Dr. Gardner diagnosed a ruptured disc at C5-6 and to a lesser extent at C6-7, primarily as a result of the January 1999 injury; he also opined that the July 1999 incident exacerbated the employee's symptoms. (Dec. 5.) He further opined that the employee was temporarily partially disabled and that he should be able to return to work as a full-time salesman with limitations.[2] Id.

The judge accepted the medical opinions of the § 11A doctor, (Dec. 5-6); she went on to find the employee to be totally incapacitated from July 21, 1999 to March 2, 2000, the date of the impartial examination. Thereafter, the judge found the employee to be

[1] The parties were allowed to submit additional medical evidence as to the employee's condition for the period of time prior to the date of the impartial examination. (Dec. 2.) See George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22, 26 (1996). We summarily affirm the judge's denial of the employee's motion to declare the impartial report inadequate in toto. (Dec. 5-6; Sept. 14, 2000 Tr. 5-10.)

[2] The doctor limited the employee "from climbing, crawling and lifting heavy objects, etc."; he did not think that a medical endpoint had been reached and felt that the employee may benefit from further therapy for his cervical spine. (Dec. 5.)

partially incapacitated, capable of working as a salesman with the restrictions given by Dr. Gardner. She further found that the restrictions precluded the employee from returning to the job he had with the present employer. The judge assigned the employee a weekly earning capacity of $480.00. (Dec. 6-7.)

The insurer argues that the judge erred by failing to address the issue of liability pursuant to G. L. c, 152, § 11B. (Insurer Br. 10.)[3] Because the judge's decision does not manifest awareness that liability was at issue, the case must be recommitted.

On the August 15, 2000 hearing date, the judge marked and admitted into evidence the insurer's "Issues/Defenses Form" in which the insurer raised, inter alia, liability, denying that there was an industrial injury. (Aug. 15, 2000 Tr. 4). And during the course of the hearing, the judge explicitly stated that liability was an issue. (Id. at 4, 128). However, nowhere in her decision does the judge likewise explicitly acknowledge that liability was an issue. In her decision, the judge does list the four witnesses who testified at the hearing, (Dec. 1); namely, the employee and three others, who testified on behalf of the insurer. These witnesses gave extensive testimony on the issue of whether the employee actually injured himself at work. But other than listing the names of these witnesses in the decision, the judge gave no indication that she recognized that liability was controverted.

In a section of the decision entitled "Statements of Issues," the judge wrote the following:

1. Is the employee entitled to benefits under § 34?
2. Is the employee entitled to benefits under § 35?
3. Is the employee entitled to benefits under §§ 13 and 30?

(Dec. 2.)

This does not necessarily indicate acknowledgement that liability is an issue. We have previously criticized this identical issue-listing practice: "The decision fails to set out the grounds on which the insurer has resisted payment of compensation." Contreras v. HLA Services, Inc., 12 Mass. Workers' Comp. Rep. 408, 410 (1998). The quoted questions

[3] General Laws c. 152, § 11B, states, in pertinent part, "Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision."

could encompass the entire spectrum of possible insurer defenses -- from no industrial injury to no incapacity. It is important that there be "precision in identifying the issues in dispute." Id.

The fact, of course, that the judge does not explicitly recognize liability as an issue would be of no consequence if the decision otherwise does so. We do not elevate form over substance. But the substance of the decision falls short. The judge does explicitly find that the employee suffered industrial injuries while working for the employer:

> In January 1999, the employee injured his neck while delivering a heavy snow plow that had to be moved by hand.
>
> . . .
>
> On July 21, 1999, the employee was at the employer's premises. The employer asked him to get the serial number on a sander. While doing so the employee was moving a fender out of the way to see the serial number when he heard a noise and felt pain in his neck.

(Dec. 3.)

> I conclude that the employee injured his neck at work on January 19, 1999 and again on July 21, 1999. These injuries arose out of and in the course of his employment with the employer.

(Dec. 5.)

However, these findings do not satisfy the mandate of § 11B that the decision "set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision." See Buonopane v. Vappi & Co., 10 Mass. Workers' Comp. Rep. 88, 90 (1996)("at a minimum, a judge is required to set forth the issues in controversy, resolve disputed and inconsistent facts with clear findings, make a decision on each issue and render a brief statement of the supporting grounds for each decision"). The judge's description here of the industrial injuries is not a "statement of the grounds" for a decision on liability. Of course, a statement of grounds need not be elaborate; the statute only requires "a brief statement." But where there is no recognition that liability is at issue, we cannot conclude that the judge had the issue in mind when she made the

findings.[4] Cf. Fahy v. Prestige Stations, Inc./Atlantic Richfield, 9 Mass. Workers' Comp. 87, 88 (1995)("a judge must identify the issues and decide each based on adequate subsidiary findings of fact grounded in the evidence"; emphasis added). Adjeman v. Jewish Home for the Aged, 11 Mass. Workers' Comp. Rep. 344, 346 (1997)(decision fails to list the defense of timely claim although raised by the insurer on its issues sheet and acknowledged by the judge at hearing).[5] Saxon Coffee Shop, Inc. v. Boston Licensing Bd., 380 Mass. 919, 929 (1980)(administrative bodies "need . . . to make subsidiary findings and to state their reasons for progressing from subsidiary facts to the ultimate decision"). On recommittal, the judge must acknowledge the issue of liability, make findings thereon and give a brief statement of the grounds therefor. § 11C.

Likewise, the case must be recommitted for the judge to reconsider her findings on earning capacity. We agree with the employee that the decision, as currently written, is deficient.

We have pointed out earlier some of the judge's findings that bear on the earning capacity issue. Thus, the judge found the employee to be 45 years old, with a ninth grade education and a work history that included driving and loading trucks, freight handler, and a salesman of truck equipment. The employee's duties as a salesman for the present employer included heavy lifting. (Dec. 2-3.) The judge accepts the impartial physician's opinion that the employee suffered a ruptured disc, (Dec. 5,6), and that the employee is " 'limited from climbing, crawling and lifting heavy objects, etc.' " Subject to those restrictions, the judge found the employee capable of working as a salesman. (Dec. 6.) Although the judge found that the employee "experienced ongoing neck pain," (Dec. 4), she

> did not credit the employee's testimony of the extent of his symptoms in light of his complaints to the impartial medical examiner. However, the employee

[4] Explicit recognition of the issue of liability coupled with the quoted findings may have sufficed. Even without an explicit recognition of the issue, specifically crediting one witness over another or other witnesses, for example, would suggest acknowledgement of the disputed issue and be sufficient.

[5] The fact that the judge here recognized at the hearing in August 2000 that liability was an issue does not mean that when she issued her decision in February 2001, more than six months later, she still had it in mind.

> is unable to return to his former employment due to his medical restrictions. No evidence was presented as to the availability and compensation of sales jobs that would accommodate the employee's medical condition. Accordingly, based upon my general knowledge and experience, I find that he has an earning capacity of $480.00 per week.

(Dec. 6-7.)

The determination of earning capacity is a question of fact. Wright v. Energy Options, 13 Mass. Workers' Comp. Rep. 263, 265 (1999). "Physical handicaps have a different impact on earning capacity in different individuals." Scheffler's Case, 419 Mass. 251, 256 (1994). The judge must determine how the employee's age, education, training and experience affect his ability to cope with his physical injury. Id. In the present case, although the judge early on in her decision found that the employee was 45 years old, and had a ninth grade education, (Dec. 2-3), she omitted those factors later on in her decision when she made findings on the employee's earning capacity. We think those factors, together with the judge's findings that the employee's sales job included heavy labor, should have been considered by the judge. Although the judge appropriately may use her own judgment in determining an employee's earning capacity, Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1998), in reaching that judgment she must consider the relevant factors. We cannot say that that was done here. See Casagrande v. Massachusetts Gen. Hosp., 12 Mass. Workers' Comp. Rep. 137, 139-140 (1998)(pertinent factors not considered). In determining earning capacity, the judge must not only make findings on the relevant factors, she must also "briefly analyze how these elements combine to justify the earning capacity assignment." Russell v. Micron Eng'g, 12 Mass. Workers' Comp. Rep. 183, 185 (1998).[6]

For the reasons given, the case is recommitted for reconsideration and findings on the issue of liability and, if liability is found, on the issue of earning capacity.

[6] It is not surprising that there was no evidence of alternative sales jobs. "Neither the insurer, trying to prove that the employee is able to return to his usual line of work, nor the employee, trying to prove his total incapacity, is likely to proffer evidence that, if persuasive, would tend to compromise its or his position." Mulcahey, supra.

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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William A. McCarthy
Administrative Law Judge

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