COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 005401-13**

Susan Landis	Employee
Commonwealth of Massachusetts	Employer
Commonwealth of Massachusetts	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Koziol and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Maureen Counihan, Esq., for the employee
Fatima I. Zaheer, Esq., for the self-insurer

HARPIN, J. The self-insurer appeals from a decision awarding the employee § 34A benefits. We affirm the decision.

The employee brought a claim for § 34A permanent and total incapacity benefits after receiving § 34 temporary and total incapacity benefits from a March 8, 2013, industrial accident. (Dec. 130-131.) After her claim was denied at a conference, she appealed, and an impartial examination was conducted by Dr. Victor Conforti. Following a hearing, the judge found that the employee, a mental health worker who injured her right shoulder attempting to prevent a patient from attacking a fellow employee, was totally and permanently disabled from performing even sedentary jobs. He awarded her § 34A benefits, beginning on June 1, 2015 and continuing. (Dec. 133, 134.) The self-insurer appeals, arguing that the judge's rejection of its vocational expert's opinion that the employee could perform a telemarketer job was the result of his personal bias toward that industry. It seeks a reversal of the decision and a recommittal to a different administrative judge.

The self-insurer called Laurie Ann Martin, its vocational expert, to testify as to her preparation of a labor market survey of the employee's vocational

abilities. Ms. Martin testified that she has had success placing persons with a rotator cuff tear and who were of the same background, education, and age as the employee. (Tr. 88-89.) Among other positions, Ms. Martin testified the employee could perform a telemarketer job, with accommodations, such as a one-handed keyboard, a headset, and automated dialing. (Tr. 92.) On cross examination Ms. Martin noted the employee had "the communication skills and interpersonal skills to be great on the phone or to make herself great on the phone, given her past experience." (Tr. 112.) The judge then interrupted the cross-examination, as follows:

> Years ago I wrote a decision that involved a telemarketing position and that time I shared a personal bias based in part on past experience.
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> I don't like telemarketing jobs. I've done the job, it's a very difficult job to do, you're not lifting 100 pounds but it's a difficult job to do. You have to be persuasive, you have to be aggressive, some would say obnoxious.
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> So it's always been my policy to not consider telemarketing jobs except under a couple of circumstances, essentially, if we are dealing with a person who is a telemarketer, then certainly we have to consider that.
>
> And if there is a situation where an individual has indicated a willingness to try the job then I would but it's a very difficult job it's in many ways performance art. And while I think we all suggest that anybody can be hired to perform on TV or in the movies because they just sit or stand and recite lines we all know that there is a lot more to it than that and [sic] there is with telemarketing. So let's move on.

(Tr. 111-112.)

The self-insurer did not object to the judge's statement at that time, nor did it raise the issue of bias of the judge at any time during the remainder of the hearing. The first time it raised the issue was in its appeal brief.

The self-insurer argues that the judge's dismissal of the telemarketing job as a possible position for the employee, except when the employee had been a telemarketer, was due to his "personal bias," raising a question whether the judge was impartial. (Self-insurer's br. 8-9.) It cites Fairfield v. Communities United, 14 Mass. Workers Comp. Rep. 79 (2000), as an instance where the reviewing board found a judge's statement comparing a telemarketer to "pornographer, abortionists," was " no basis to conclude that telemarketing is an inappropriate source of employment for consideration in an earning capacity analysis." Id, at 81. The self-insurer asks that the decision be vacated and recommitted to a different judge, due to the "personal bias" of the assigned judge.

As an initial matter, we have held a number of times that any claim of bias must be raised at the time the party asserts it became manifest; otherwise it is waived. Smith v. DMHNS 1 North Shore Area Danvers, 31Mass. Workers' Comp. Rep 221, 225 (2017)("claim of bias must be raised below, especially when the claimed bias occurs during a hearing, in order for the judge to address the claim and make findings on whether or not he has demonstrated bias towards a party").[1] The failure of the self-insurer to raise the alleged "personal bias" of the judge against telemarketers at any time during the hearing process constitutes a waiver of its right to raise it on appeal.

The self-insurer also argues the judge impermissibly discredited the analysis of the insurer's vocational expert and based his award of § 34A benefits on his own vocational analysis. Citing Fairfield, supra, again, it asserts the judge's award was not supported by credible evidence, as he

[1] See also Morales v. Not Your Average Joe's, Inc., 31 Mass. Workers' Comp. Rep. 1, 6 (2017); Comeau v. Enterprise Electronics, 29 Mass. Workers' Comp. Rep. 187, 193 (2015). Cf. Amorim v. Tewksbury Donuts, Inc., 31 Mass. Workers' Comp. Rep. 93, 96 (2017)(where bias claim arose from statements made in decision and not at hearing, claim not waived when it was raised for the first time on appeal).

discounted the vocational evidence that the employee was capable of working as a telemarketer.[2]

The self-insurer's argument ignores the judge's adoption of Dr. Conforti's opinions that the employee could lift only two to five pounds on an occasional basis, could not use her right arm above chest level, and could not perform repetitive tasks. (Dec. 132.) While the judge noted that the doctor found the employee partially disabled, with a sedentary work capacity, Dr. Conforti also was of the opinion that vocational issues could influence her ability to return to work. (Dec. 133.) Matched with these limitations, the judge then adopted the opinion of the employee's vocational expert, Carol Falcone, that the restrictions on the employee's use of her right arm would be a significant impediment to her return to work, and that her long history of heavy work, coupled with her history as a poor student, would prevent her from working in any job. (Dec. 132, 133.) Finally, the judge found the employee's testimony credible that she could not lift more than five pounds, could do no overhead work, could use her right hand only as a helper to her left hand, is entirely sedentary, and is in constant pain. (Dec. 131-132.)

In his conclusion the judge found that "vocationally [the employee] cannot perform the requirements of sedentary jobs. She has only a ninth grade education without a GED and suffers from dyslexia. Her entire work history consists of heavy physical labor." (Dec. 133.) He then referred to his earlier opinion on telemarketing.

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[2] The self-insurer also argues that the judge's "dismissal [of] further telemarketing related questions deprived the Self-insurer counsel the opportunity to re-direct Ms. Martin." (Self-insurer's br. 8.) There was no such deprivation. The judge's comments on telemarketers occurred during the cross examination of the expert by the employee's counsel. (Tr. 111-112.) At the conclusion of that cross-examination, the self-insurer's counsel was given the opportunity to re-direct, which she utilized for two questions regarding the procedure followed in the production of a labor market survey. (Tr. 116-117.) There was no attempt made by the judge to limit her re-direct in any way.

> The self-insurer's vocational expert suggested that she might find work as a telemarketer. But I never consider telemarketing as a light duty job unless the claimant has past telemarketing experience or has expressed a willingness to try the job. Telemarketing is a difficult job with a skill set not possessed by most people. One must be able to sell something over the phone, getting customers to give out personal financial information to a stranger over the phone. One must be persistent, even rude to make the sales. There is no evidence in this case that the employee possesses these skills.

(Dec. 133.)

The judge, despite his gratuitous comments during the hearing, made specific subsidiary findings that the employee was not capable vocationally of performing any work, including telemarketing, not because he felt that job was improper, but because, based on the evidence, he found the employee lacked the skills of a telemarketer to sell something over the phone. Essentially, he found the job was unsuitable for her. (Dec. 133.) Such findings are in accord with a judge's duty to determine the employee's level of incapacity, when presented with medical evidence showing a partial disability but adopted vocational evidence that there are no jobs the specific employee can perform. Scheffler's Case, 419 Mass. 251, 256 (1994).[3]

[3] The self-insurer argues that under the rule of Fairfield, supra, the decision must be reversed, because the judge's comments in the present case were similarly "groundless, irrelevant and patently inappropriate." Id., at 81. However, in Fairfield the telemarketer position was the only position ultimately identified by the insurer's vocational expert as suitable for the employee. The judge's rejection of that position in "gratuitously insulting language that is unjustified by anything properly before him (citation omitted) [makes] the finding arbitrary, capricious and unseemly." Id. In the present case there were several positions identified by the insurer's expert, such as optical greeter, usher and ticket taker, mental health job, Hertz driver, and crossing guard, in addition to telemarketer, all of which the expert felt were suitable for the employee. (Tr. 89-94.) Unlike in Fairfield, the judge here listed specific non-arbitrary reasons why he felt the employee could not perform the duties of a telemarketer. (Dec. 133.) The case thus does not apply here.

We therefore affirm the decision. Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,680.52.

So ordered.

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William C. Harpin
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **November 14, 2018**