COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025926-96**

Thomas Corkery	Employee
General Motors Corporation	Employer
General Motors Corporation	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, Smith and McCarthy)

APPEARANCES
Michael J. Powell, Jr., Esq., for the employee
Robert P. Jachowicz, Esq., for the self-insurer

WILSON, J. The self-insurer appeals from a decision in which the administrative judge awarded two closed periods of weekly benefits under §§ 34 and 35 and ongoing partial incapacity benefits from December 1, 1996 for a contusion injury at work on July 10, 1996. Because we discern errors in the judge's use of the impartial medical report, we vacate the decision in part and recommit the case for further findings.

Mr. Corkery's work injury occurred when he was unloading a rack that shifted, causing him to fall off the forklift that he was operating onto his back, hitting his head on the concrete floor. He suffered a large abrasion on his lower back. After being treated for lower back pain and headaches, he was released to return to modified duty work in August 1996 by both the insurer's examiner and his treating physician, Dr. Lever. (Dec. 4.)

The employee's return to work on August 30, 1996 did not go well. Although the employee had provided his supervisor with Dr. Lever's medical restrictions, he was assigned to his regular duties of lifting parts weighing up to forty pounds, along with frequent bending in a full shift of eight hours on his feet. As the employee could not tolerate the physical demands of the job, on September 16, 1996, he left work on Dr. Lever's advice to rest and undertake a course of physical therapy. (Dec.5.) Despite

unresolved back problems, the employee returned to work again in October, due to financial constraints. Because he was unable to perform the regular job duties to which he was again assigned, the employee voluntarily retired from his job, after working at General Motors for thirty-three years. (Dec. 3, 5.)

The employee brought a claim for workers' compensation benefits after the self-insurer paid him benefits without prejudice for several weeks in July and August of 1996. The judge denied the employee's claim at conference and he appealed to a full evidentiary hearing, where he sought a closed period of temporary and total incapacity benefits, as well as partial incapacity benefits from September 16, 1996 to date and continuing. The self-insurer defended solely on the basis of incapacity and extent thereof. (Dec. 2-3.)

On March 4, 1997, the employee underwent an impartial medical examination under the provisions of G.L. c. 152, § 11A. (Dec.7.) Dr. Geuss indicated that the employee had suffered a new injury; contusion, hematoma and abrasion of the right flank, as a result of his July 10, 1996 industrial accident. (Dec. 8.) He reported that the employee complained of having back pain since that event, but noted that a contusion will normally heal in a few months. (Dec. 8-9.) The doctor ruled out disc herniation, spinal stenosis and nerve impingement. He then opined that arthritic changes noted in objective tests were not caused by the 1996 work event, but instead dated back to 1986,[1] and that the employee was not at a medical end point. (Dec. 7, 8.) In his opinion, the employee was capable of light duty work if there were some flexibility in sitting,

[1] As early as 1986, the employee suffered from back injuries at work that resulted in a pre-existing arthritic condition in his lower spine. (Dec. 7.) Because the employee's pre-existing degenerative condition was due to work-related injuries, however, the administrative judge correctly noted that no analysis of this claim was necessary under the provisions of G.L. c. 152, § 1(7A). (Dec. 8.) General Laws c. 152, § 1(7A), provides in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

standing and walking, and if he did not lift over twenty pounds on a regular basis. (Dec. 8.) The parties chose not to depose the impartial physician. The judge ruled that the doctor's report was adequate and the medical issues not complex, thereby denying the employee's motion to introduce additional medical evidence. (Dec. 2.) See § 11A(2).

John Hoyle, supervisor of labor relations for the employer, testified for the self-insurer regarding the employer's policy of providing light duty positions within medical restrictions imposed by employees' physicians. (Dec. 6.) But, as the administrative judge found, employees were required to stand and walk for extensive periods throughout their shifts to perform their duties. (Dec. 6, 11.) Mr. Hoyle also testified that there was still a light duty job available to the employee in the binable parts department at a rate of pay determined by the employee's seniority. (Dec. 6.)

The judge credited the employee's testimony that he continued to have pain in his lower back, and that he could not perform the regular duties to which he was assigned upon returning to work because of that pain. (Dec. 9.) The judge also credited Mr. Hoyle's testimony that a light duty job had been offered to the employee. She further credited the employee's testimony that, despite his known medical limitations, he was assigned to his regular job duties, which included excessive bending, stooping, lifting, prolonged standing and walking. (Dec. 10-11.) The judge adopted the opinions of the impartial physician, noting that the doctor's failure to provide any additional diagnoses indicated that he both accepted the standing diagnoses of previous medical providers and credited the employee's complaints of pain. (Dec. 9.) She found that the employee continued to have back pain that limited his ability to perform his job and that his medical condition was causally related to the work incident of July 10, 1996. (Dec. 9-10.) The judge concluded as well that because the job to which the employee twice returned between August and November 1996 was not adjusted to reflect the employee's limitations, there was "no logical reason to return him to that job situation[,]" as it was not suitable employment that the employee was physically capable of performing, as

required by G.L. c. 152, §§ 35D(3) and (5).[2] (Dec. 11.) Instead, the judge found the employee to be partially incapacitated based on the opinion of the impartial physician and the requisite factors under Scheffler's Case, 419 Mass. 251 (1994), and assigned the employee the statutory maximum for partial incapacity benefits under § 35: 75% of his rate of compensation under § 34; $390.19 per week (an earning capacity of approximately $216.00 per week) from December 1, 1996 to date and continuing. (Dec. 11-12.)

The self-insurer advances several reasons for its contention that the award of § 35 benefits is arbitrary and capricious. It challenges the judge's analysis in finding that the job offered to the employee was not suitable under § 35D(3), and asserts that the evidence requires a finding that the employee could perform the duties of the available job offer at no loss in pay. The former argument has some merit. The judge's findings regarding the job's lack of suitability rely in part on work limitations that were not articulated by the impartial physician. The judge incorrectly found that the restrictions imposed by Dr. Geuss included no bending or reaching. (Dec. 11.) Because the judge found that the job offer would require bending and stooping activities not advised by the employee's doctor and that the employee had returned to work that included bending,

[2] General Laws c. 152, §§ 35D(3) and (5), provide in pertinent part:

> For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:--
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> (3) The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it.
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> . . .
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> (5) Implementation of this section is subject to the procedures contained in section eight. For purposes of this chapter, a suitable job or employment shall be any job that the employee is physically and mentally capable of performing, including light work, considering the nature and severity of the employee's injury, so long as such job bears a reasonable relationship to the employee's work experience, education, or training, either before or after the employee's injury.

stooping and reaching, (Dec. 6, 10), we ordinarily would require that the question of the job's suitability under § 35D(5) be revisited, consistent with the correct restrictions on sitting, standing, walking and lifting imposed by the impartial physician. See Herrera v. Cambridge Imported Autobody, 11 Mass. Workers' Comp. Rep. 521, 523 (1997) (case recommitted where judge substituted a different assessment of limitations for that of the impartial examiner). But because the administrative judge explicitly ruled out the offered job for another reason that, taken alone, supports her finding that the job offer was unsuitable, the errors on physical limitations are not fatal to that analysis. Hence, the conclusion on the job offer stands, as the judge also found that the binable parts job required that it be performed in a standing position, (Dec. 11.), whereas a restriction imposed by Dr. Geuss calls for flexibility in standing.

Although we see no reversible error in the findings on the suitability of the job offer, the judge's findings on extent of physical disability and its effect upon the employee's earning capacity in the open job market must be revisited, applying only those limitations stated by the impartial examiner, Dr. Geuss. It is unclear to us to what extent the judge's incapacity analysis was affected by the erroneous inclusion of limits on bending and reaching in the list of limitations determined by Dr. Geuss. (Dec. 11.) It is therefore appropriate to recommit the case for further findings of fact. G.L.c. 152, § 11C.

The self-insurer also contends that because the impartial medical opinion does not causally relate the employee's lumbar arthritic changes to the July 10, 1996 incident but, rather, to the 1986 claim that was settled, there is no medical evidence to support the judge's decision. An examination of the transcript at pp. 4-5 and the self-insurer's exhibit 1, however, reveals that the self-insurer did not raise causal relationship as an issue at hearing, and therefore, has waived that issue. The sole defense raised by the self-insurer to the employee's claim was disability and extent thereof.

The self-insurer raises another issue that bears comment. It asserts that the December 1, 1996 date chosen by the judge for the commencement of ongoing partial incapacity benefits does not correspond to any date in the evidence that indicates a change in the employee's medical or vocational condition. It is, however, the date the

employee left work. As such, it may be an appropriate date for commencement of benefits, as it is then that the employee's actual earnings under § 35 D(1) stopped. If on recommital the judge concludes that the employee had an impaired earning capacity on December 1, 1996, based on the medical and lay evidence before her, a commencement of benefits on that date would be properly grounded in the evidence.

Accordingly, we recommit the case to the administrative judge for further findings consistent with this opinion.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: 6/28/1999

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Suzanne E.K. Smith
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge