COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 010696-10**

William Herrera	Employee
Mediate Management, Inc.	Employer
AIM Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Harpin)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Gia M. Bradley, Esq., for the employee
Michael K. Landman, Esq., for the insurer

KOZIOL, J. This is the employee's appeal from a decision denying his claim for § 34A permanent and total incapacity benefits. We recommit the matter for further findings of fact.

On April 26, 2010, the employee, a building janitor, sustained a work-related injury to his right knee, consisting of a torn medial meniscus. The employee underwent a course of physical therapy and an arthoscopic menisectomy, but his knee pain did not improve with either intervention. (Dec. 5.) The insurer accepted liability for the injury, and paid the employee three years of § 34 benefits. (Dec. 7.) When the employee's § 34 benefits exhausted on May 9, 2013, the insurer voluntarily commenced payment of maximum partial incapacity benefits under § 35. Id.

The employee filed the present claim seeking payment of § 34A benefits from May 10, 2013 and continuing. At the conference, the judge awarded a closed period of § 34A benefits, from November 19, 2013 to May 19, 2014, followed by payment of maximum partial incapacity benefits at a rate of $282.45 per week based on an average weekly wage of $627.68 per week and an earning capacity of $156.92 from May 20, 2014 and continuing. Both parties appealed. The judge allowed the employee to join a claim under §§ 13 and 30 for a right total knee replacement, and he

allowed the insurer to join the issue of § 1(7A) for hearing. (Tr. 10.) On January 15, 2014, the employee was examined by Dr. Nabil Basta pursuant to § 11A(2).

At the hearing, the judge found the medical issues were complex, allowing the parties to submit additional medical evidence. (Tr. 10.) Both parties submitted additional medical evidence, and the insurer took the deposition of Dr. Basta. (Dec. 1, 2; Ex. 6, 7.) [1] The employee subsequently withdrew his request for the surgery, without prejudice. (Dec. 4.)

The judge denied and dismissed the employee's § 34A claim and found the employee is partially disabled and possesses a part-time minimum wage earning capacity. (Dec. 7.) The judge ordered the insurer, pursuant to § 11D, to recover any overpayments made as a result of the conference award of a closed period of § 34A benefits. (Dec. 8.)

On appeal, the employee asserts the judge committed three errors in denying his claim for § 34A benefits. First, the employee argues the judge erred by assigning a part-time minimum wage earning capacity to a full-time worker who earned "well in excess of the minimum wage," because such work does not meet the standard of "remunerative work of a substantial and non-trifling character." (Employee br. 2, 5.) Second, the employee argues the judge's decision was arbitrary and capricious because he failed to "conduct a proper Scheffler/Frennier analysis to determine the effect the work injury had on the employee's chances of performing gainful employment." (Employee br. 7-12.) Lastly, the employee argues the judge erred by failing to consider the employee's disability related to both his injury and his pre-existing arthritis as required by § 1(7A). (Employee br. 12-16.) We address the last argument first.

[1] The decision lists the employee's additional medical evidence as "Exhibit - #6" and the insurer's additional medical evidence as "Exhibit - #7," (Dec. 2), however the actual exhibits are marked Ex. #7 and Ex. #6 respectively. The insurer's submission consisted of the February 1, 2011 and January 30, 2012 reports of its examining physician, Dr. Suzanne Miller, who did not causally relate the employee's knee complaints to the industrial injury. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file).

In his decision, the judge stated "[a]t issue is whether the employee is totally and permanently disabled as a result of the work related injury." (Dec. 7.) Regarding the medical opinions, the judge made the following findings:

> I adopt portions of the medical opinions of Nabil Basta, M.D. and find that the employee sustained a medial meniscal tear of the right knee; that the performed arthroscopic surgery to the right knee was reasonable and appropriate; that the employee had pre-existing arthritis to the right knee unrelated to the injury and progressive in nature.
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> I adopt portions of the medical opinions of Richard S. Fraser, M.D., the employee's medical expert, and find that the employee has restrictions on bending, twisting, turning, lifting more than five or ten pounds, no prolonged standing, sitting, walking or driving and that the work related injury accepted by the insurer remains a major contributing factor to his current disability and need for treatment.

(Dec. 6-7.)

Rather than performing an analysis pursuant to § 1(7A), as required by our decision in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005), the judge then made the following findings, from which the employee's appellate argument stems:

> It is the opinion of the impartial physician that no part of the employee's right knee disability is related to the accepted injury. I have not adopted that portion of his opinion as I credit the employee and his expert that the effects of the accepted injury continue to have a major effect on right knee [sic] and his ability to work. I do adopt, however, the impartial physician's opinion and find that the pre-existing arthritis in the right knee has deteriorated since the injury increasing his level of disability and that this increased disability is unrelated to the injury. I find that the accepted injury in and of itself is partially disabling and the employee could work at a very light duty job at least part-time and make minimum wage if his only restrictions were those as a result of the work injury. I deny the employee's claim for benefits pursuant to § 34A.

(Dec. 7.)

The employee argues that because, in his view, § 1(7A) applies and the judge adopted Dr. Fraser's "a major cause" opinion, the judge erred in parsing out the effects of the meniscal tear from the remainder of the disability attributable to the

knee. (Employee br. 14.) Accordingly, he asserts recommittal is required for the judge to consider the disabling effects of both the pre-existing condition and work injury. The insurer argues the employee did not prevail on the § 1(7A) argument in "this . . .classic § 1(7A) case, where a relatively minor or even modest injury to a body part which has significant pre-existing degenerative arthritis present, is limiting with respect to work capacity when the non-work related underlying degenerative condition is removed from the entire injury complex, and the simple industrial injury is viewed in a vacuum." (Ins. br. 6.) The insurer does not contest the judge's decision and assignment of the earning capacity, arguing the judge properly "segement[ed] away what the Insurer's responsibilities were, are, and will be with respect to the torn medial meniscus." Id. 6-7.

Neither party's contentions are clear from the decision. As a threshold matter, the judge made no explicit findings that this is a "combination" injury contemplated by § 1(7A). We cannot tell from the judge's findings whether the employee sustained a combination injury, or whether the employee has two separate conditions which do not combine with each other to cause or prolong the employee's disability. See Murphy v. American Steel & Aluminum Corp., 23 Mass. Workers' Comp. Rep. 225, 226-227 (2009)("Although one of the judge's findings alluded to § 1(7A)'s 'a major' cause standard, [doctor] did *not* opine that the employee's work-related injury, combined with his prior ALS condition 'to cause or prolong [the employee's] disability or need for treatment' "). Because § 1(7A) was raised as a defense, the parties are entitled to findings addressing whether it applies. Accordingly, we recommit the matter for the judge to perform the Vieira analysis.

We do not disturb the award of partial incapacity benefits. The insurer never sought to discontinue the employee's benefits, (Dec. 4), and it does not contest that the employee is entitled to maximum partial incapacity benefits. (Dec. 7.) Most importantly, the insurer did not appeal from the decision, and it cannot obtain a better position as a result of its failure to do so. Brackett v. Modern Continental Constr. Co., 22 Mass. Workers' Comp. Rep. 319, 324 (2008); see Fay v. Federal Nat'l Mtge.

Ass'n., 419 Mass. 782, 789 (1995)("failure to take a cross appeal precludes a party from obtaining a judgment more favorable to it than the judgment entered below").

The employee also argues the judge erred by failing to conduct a meaningful review of the employee's vocational factors in accordance with Scheffler's Case, 419 Mas. 251, 256 (1994) and Frennier's Case, 318 Mass. 635, 639 (1945). The judge found that at the time of the hearing, the employee was seventy-one years old. (Dec. 5.) The employee has an eighth grade education, which he completed in his native country, Columbia. (Dec. 5.) Upon immigrating to this country in 1994, the employee began working as an assistant automobile mechanic, a position he held until he began working for the employer as a building janitor in 1999. The employee "speaks and reads some English but is not proficient and he does not write English." (Dec. 5.) He also has no computer skills. Id. The judge further found the employee "has not improved since the accident. He has constant severe right knee problems. He has severe problems climbing stairs, bending and walking any distance." (Dec. 6.) The judge further stated that in formulating his benefit award, he "judg[ed] [the employee's] veracity as a witness" and took "into account his age, education, training, work history and transferrable skills." (Dec. 7.)

"It is not enough that the judge merely incant the vocational factors enunciated in Frennier's Case, 318 Mass. 635, 639 (1945), and Scheffler's Case, 419 Mass. 251, 256 (1994). The judge must make findings addressing these factors." Marble v. Milton Hospital, 16 Mass. Workers' Comp. Rep. 164, 167 (2002), quoting from, Griffin v. State Lottery Comm'n, 14 Mass. Workers' Comp. Rep. 347, 349 (2000). On recommittal, the judge should make findings "regarding how [these factors] . . . influenced his appraisal of the effect of the injury on [the employee's] earning capacity," id., so as to support his ultimate conclusion regarding any benefit award. See Anastasio v. Perini Kiewit Cashman, 19 Mass. Workers' Comp. Rep. 102, 104 (2005)(judge must conduct "appropriate individualized assessment of the employee's ability to obtain and retain remunerative work of a substantial and non-trifling nature").

Lastly, we reject the employee's claim that a part-time minimum wage earning capacity for a worker who, but for the injury, would be working full-time at an hourly rate in excess of minimum wage, is trifling as a matter of law. In the present case, the maximum partial incapacity payment provides an earning capacity of $156.93, representing approximately seventeen hours of work per week at the minimum wage rate of $9.00 per hour. The interpretation urged by the employee finds no support in our case law. Barbosa v. Harvard University, 25 Mass. Workers' Comp. Rep. 265, 269 (2011)(actual earnings of $75.00 per week, not "trifling" so as to defeat support for that earning capacity under G. L. c. 152, § 35D); Wright v. Energy Options, 13 Mass. Workers' Comp. Rep. 263 (1999)(finding of $150.00 per week earning capacity for worker with average weekly wage of $1,504.93, not trifling).

We recommit the matter for further findings of fact addressing the § 1(7A) defense and to provide additional findings regarding the employee's disability and the extent of his incapacity.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **April 14, 2016**