COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 07807-89**

William J. Rodgers	Employee
Massachusetts Dept. of Public Works	Employer
Commonwealth of Massachusetts	Self-insurer

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

APPEARANCES
Thomas H. O'Neill, Esq., for the employee at hearing
Paul G. Lalonde, Esq., for the employee on appeal
Arthur Jackson, Esq., for the self-insurer

MAZE-ROTHSTEIN, J. The employee appeals from a third decision in his claim for compensation benefits stemming from a 1989 industrial injury. The case has been recommitted twice for further findings of facts on earning capacity. The current appeal presents arguments on earning capacity, once again, and on the judge's failure to list the employee's medical exhibits in the decision. We agree that the judge erred in the latter respect, and therefore recommit the case for clarification of that matter. We affirm the decision in all other respects.

The case has been the subject of two prior written decisions by the reviewing board, so we need not recount again the facts underlying this matter. Suffice it to say that, on the second recommittal, we directed the judge to make an earning capacity assessment of the employee without reference to the gross receipts of the employee's trash collection self-employment. We directed the judge to look to the net income from that employment activity instead, as evidenced in the employee's tax returns from numerous years in the disputed period. See Rodgers v. Dept. of Public Works, 11 Mass. Workers' Comp. Rep. 655 (1997). In the present decision on appeal, the judge succeeded in accomplishing the task:

> The employee when questioned about his tax deductions [in his income tax returns, 1989-1997, excluding 1990, Employee's Ex. 2] offered no receipts or explanations and admitted he conducts a lot of his business under the barter system and did not report such transactions on his tax returns . . . .
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> . . . I find that the employee's tax returns from 1989 to 1997, excluding 1990, have no evidentiary value since no receipts were provided and the employee could not explain his deductions, thus his tax returns are not a reflection of his real income . . . .

(Dec. 5, 7.) Moreover, the judge assessed the employee's other vocational attributes:

> . . . I find the employee's latest testimony indicates that he has greater skills and ability beyond his trash business skills. He operates a maple syrup business, his own tractor, snow plowing, recycling when picking up weekly trash, raising and feeding pigs and has experience as a truck mechanic. All of these skills and abilities clearly support my findings that the employee has the capacity to earn if not greater, at least his prior average weekly wage . . . .

(Dec. 7.)

There is no error here. It was within the judge's authority to credit or disregard the employee's proffered evidence of his net earnings. Likewise, the judge was authorized to use his own knowledge and expertise to assess the probative weight of the employee's other potential income-producing activities in reaching a determination of earning capacity. See Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988), citing O'Reilly's Case, 265 Mass. 456, 458 (1929); Mendes v. Percor, Inc., 12 Mass. Workers' Comp. Rep. 487, 490-491 (1998). We affirm the decision as to the economic and vocational aspect of the judge's earning capacity analysis. See Scheffler's Case, 419 Mass. 251, 256 (1994).

However, the employee's other argument on appeal gives us pause: the judge allowed additional medical evidence at a status conference on August 25, 1998, due to the report's inadequacy, but then inaccurately stated in the decision that the § 11A report and deposition were deemed adequate.[1] (Dec. 4; Employee Br. 10-11; December 1, 1998

[1] The judge adopted the January 11, 1999 deposition testimony of the § 11A physician, who had examined the employee on March 13, 1996. (Dec. 5, 7.) The doctor opined that the employee could lift up to twenty pounds and could work up to forty hours a week, that he placed no

Tr. 113.) See G.L. c. 152, § 11A(2). Moreover, the judge failed to list as exhibits the employee's extensive list of medical documents offered in response to the judge's allowance of it. The self-insurer does not dispute that the decision is deficient in these regards.

We are thus at a loss as to whether the judge received and reviewed the employee's medical documents. We must therefore recommit the case once more.

> This is simply not a case where through harmless error a judge failed to list exhibits but obviously considered the offered medical as reflected in his recitation of the medical evidence. [Citation omitted.] Nothing in the findings suggests the judge considered the medical reports delivered by the employee. Failure to consider the employee's medical evidence would adversely impact on substantial rights of the employee, foreclosing the employee from the opportunity to meet his burden of proof, in violation of his right to due process.

Richard v. Edibles Restaurant, 8 Mass. Workers' Comp. Rep. 122, 125 (1994). See O'Brien's Case, 424 Mass. 16, 22 (1996); Marion v. M.B.T.A., 11 Mass. Workers' Comp. Rep. 581, 582-583 (1997).

We must therefore recommit the case once again for the judge to list as exhibits and assess the probative weight of the employee's medical evidence. The employee has requested that the case be recommitted for a de novo hearing before a different administrative judge, given that this is the third time that the case requires return to the judge. The request is not without authority. See Medley v. E.F. Hauserman Co., 10 Mass. Workers' Comp. Rep. 108, 111 (1996). However, the reason for our present recommittal is not a continuation of the same error that spawned the first two recommittals. It is an error that might be purely ministerial, and is correspondingly simple to fix. And even if not, there is no reason to conclude that the judge cannot fairly

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restrictions on standing, walking or sitting, and that the employee had been capable of light duty work since his pre-injury back surgery in 1986. (Dec. 5-6.) The doctor also commented on the employee's particular vocational activities of trash collecting and the maple sugar business. Id.

consider the employee's medical evidence where he successfully corrected errors responsive to the prior recommitals.

We therefore, recommit the case for further findings and clarification of the allowance of additional medical evidence.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: October 30, 2000