COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037920-13**

Robert Griffin	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Brian C. Cloherty, Esq., for the employee
Martin J. Long, Esq., for the insurer at hearing
Justin R. Veiga, Esq., for the insurer on appeal

FABRICANT, J. Both parties appeal from a decision awarding the employee medical and permanent hearing loss benefits, pursuant to §§ 30 and 36 respectively, and denying all claims for weekly benefits pursuant to §§ 34 and 35. While we see no merit to the self-insurer's challenge to the § 36 award,[1] we agree with the employee that recommittal is required for a proper analysis of the debilitating effects of his injury and further findings of fact regarding his earning capacity.

The employee, fifty-six years old at the time of the hearing, worked as a laborer for the self-insurer for 30 years beginning in 1982. For at least 20 of those years, he worked primarily inside the subway tunnels, where the noise was described as "screeching" and "deafening." (Dec. 4.) Despite the high level of noise, workers were not permitted to wear ear protection on the job for safety reasons. "The employee's binaural work induced hearing damage, [] began in about 2004 and continued over 12 years until his last day of work." (Dec. 7.) His last day of noise exposure was November 30, 2012, and he retired from the MBTA on December 1, 2012. (Dec. 5-6.)

[1] The self-insurer raised issues regarding the claimed date of injury, and the employee's future use of hearing aids. (Self-Ins. br. 7-9.)

Following his retirement from the MBTA, the employee tried to obtain employment elsewhere, but testified that his hearing deficit made it hard for him to find and keep a job, as he believed that employers thought this condition made him a safety risk. Regardless, he was able to perform all the required duties of a temporary job he obtained with the United States Postal Service, doing custodial work for six weeks in 2013. (Dec. 5, 6.)

On January 26, 2016, the employee was examined by the § 11A impartial physician, Dr. William E. O'Connor, Jr., who authored a written report of the same date. (Statutory Ex. 1.) A follow-up report dated March 28, 2016, provides a supplemental evaluation following Dr. O'Connor's review of additional medical records. (Statutory Ex. 1A.) The judge adopted Dr. O'Connor's opinion clearly identifying the causally related disability of "bilateral noise-induced marked sensorineural hearing loss caused by years of exposure in the course of his employment to 'significant noise' working in tunnels in the MBTA without the availability of noise ablation protection." (Dec. 5.) She further adopted Dr. O'Connor's opinions that the employee should not be exposed to noise at work without noise protection, and that hearing aid evaluations would be appropriate. (Id.; Statutory Ex. 1.)

The judge also adopted the employee's testimony that, for safety reasons, he was precluded from using ear protection on the job at the MBTA, and now "his hearing ability is insufficient for him to perform his work [there]." (Dec. 7-8.) Ultimately finding a causally related injury, the judge awarded § 36 permanent hearing loss benefits[2] and § 30 medical benefits, including ordering the self-insurer to pay for bilateral hearing aids. (Dec. 10 – 11.) However, despite finding that the employee cannot return to his previous

[2] Dr. O'Connor's January 26, 2016, report evaluated the results of a hearing test on March 23, 2015 and found, according to the AMA standards, a 43.1% hearing loss for the right ear, and a 33.8% hearing loss for the left ear, resulting in a bilateral hearing impairment of 35.3%, representing a 12% impairment of the whole person. (Statutory Ex. 1.) Accordingly, the judge ordered the self-insurer to pay the employee § 36 benefits in the amount of $26,343.73. (Dec. 10.)

employment, the judge noted that the employee has demonstrated the ability to work unrestricted "in a full-time, full-duty capacity in any job where he will not be exposed to unprotected loud noise." (Dec. 7.) Thus, the judge denied the employee's claim for § 34 or § 35 benefits. (Dec. 10.)

On appeal, the employee argues that the judge's findings and ultimate decision denying § 34 and § 35 benefits are not supported by the evidence. We first note that the employee's actual medical condition does not give rise to much dispute.[3] The employee experienced improvement in his hearing when testing hearing aids in his doctor's office, but at the time of the hearing, he had yet to receive his own hearing aids for regular use. (Dec. 5, 9; Tr. 56, 68, 76.) However, regardless of any deficit correction afforded by the employee's use of hearing aids, the judge found he remains medically unable to ever return to his prior employment with the MBTA. (Dec. 5.)

Although the employee has, indeed, been able to successfully work, unrestricted, at another job, this finding by the judge does not, in isolation, provide a sound basis for the outright dismissal of the employee's § 34 and/or § 35 claims. Upon finding the employee disabled from his usual job, the judge turned to an analysis of his earning capacity, stating, "I am also persuaded by the [employee's] testimony that, *except for his temporary assignment as a custodian for the USPS, his attempts to work after his retirement from the MBTA were unsuccessful because of the extent of his hearing loss*." (Dec. 6; emphasis added.) However, despite this specific acknowledgment that the employee's disability continues to have a deleterious effect upon his ability to obtain and retain employment, the judge noted that the impartial physician "did not restrict the [employee] from work," adding that "there is no medical evidence to find that the [employee] is entitled to indemnity benefits under the Act." (Dec. 9-10.) The judge then inexplicably concluded "the [employee] has demonstrated the capacity to work and I conclude that he has no medical restrictions associated with his hearing loss to prevent him from working full time, full duty." (Dec. 10.)

[3] The judge found no " 'combination injury' within the meaning of" § 1(7A), and the self-insurer does not take issue with that ruling on appeal. (Dec. 9.)

On its face, the judge's decision is devoid of any explanation that might reconcile these seemingly disparate findings. The judge has essentially determined that the employee, who is disabled from returning to his job at the MBTA, can earn his pre-injury average weekly wage of $1,236.80 (Dec. 7). She also found that, due to the extent of his hearing loss, he has been unable to obtain gainful employment after retiring from the MBTA, except for a temporary assignment as a custodian for the USPS. (Dec. 6, 7.) However, she "made no findings identifying the factual source supporting [her] conclusion that despite [his] restriction, the employee was able to perform work in the open labor market earning his pre-injury wage." Anitus v. Naratone Security Corp., 24 Mass. Workers' Comp. Rep. 221, 223 (2010).[4] Because the employee cannot return to the same type of work he has done for 20 years, and it is unclear what he is capable of earning in other types of jobs, we agree that the judge failed to perform the foundational analysis required to determine his earning capacity, if any, under these circumstances.[5]

A judge's decision must 'adequate[ly] reveal the basis for [its] ultimate finding." Lavalley v. Republic Parking, 29 Mass. Workers' Comp. Rep. 21, 22 (2015) citing Eady's Case, supra at 724. Moreover, a decision cannot stand in the absence of a foundation for the judge's ultimate conclusion denying benefits. Praetz v. Factory Mut. Eng. & Reseach, 7 Mass. Workers' Comp. Rep 45 (1993); see also Anitus, supra. The lack of adequate findings of fact led to the judge's failure to analyze adequately, the

[4] In Anitus, supra, the employee, a security guard, was psychiatrically disabled from returning to work for his employer because he could no longer carry a gun, but could work in a position in which he did not have to have a firearm. We recommitted the case for "findings as to how the employee's individual vocational profile, Scheffler's Case, 419 Mass. 251, 256 (1994), combines with his restriction from gun usage and the overall labor market." Id. at 223, citing Eady's Case, 72 Mass. App. Ct. 724 (2008). See also Vallee's Case, 72 Mass. App. Ct. 1117 (2008)(Memorandum and Order Pursuant to Rule 1:28)(employee who was totally disabled from returning to work for his prior employer but was able to return to the same type of work he had done with that employer, was "entitled to reasonable time to find a job, and his compensation should not be reduced . . . until he has found suitable work or it appears that his failure to do so is due to causes other than the injury").

[5] Of course, it is the employee's burden to prove loss of earning capacity. Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 322 (2003).

requisite factors assessed in determining incapacity and the extent thereof.[6] Thus, we cannot determine whether the judge properly applied the law in denying and dismissing the employee's claims for §§ 34 or 35 benefits. We vacate the denial and dismissal of the employee's §§ 34 and 35 claims, summarily affirm the award in all other respects, and recommit the matter for further findings consistent with this opinion. Because the hearing judge is no longer with the department, we refer this case to the senior judge for re-assignment.

The self-insurer shall pay the employee's counsel a fee pursuant to G. L. c. 152, § 13A(6), in the amount of $1,654.15.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: ***December 7, 2017***

[6] While the judge's decision is replete with recitations of the employee's testimony, there are few actual findings of fact dispositive of these issues. Katz-Kelley v. General Elec. Co., 10 Mass. Workers' Comp. Rep. 691, 693(1996)("What we don't have but require is the judge's fact finding that tells us not what the witnesses stated, but what the judge finds as fact").