COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 021759-99

Jeremiah T. Donovan	Employee
Keyspan Energy Delivery	Employer
Keyspan New England	Self-Insurer

REVIEWING BOARD DECISION

(Judges Koziol, McCarthy and Fabricant)

APPEARANCES

Dino R. Santangelo, Esq., for the employee
W. Todd Huston, Esq., for the self-insurer

KOZIOL, J. The employee, who has paraplegia, appeals from a decision denying and dismissing his § 30 claim for the purchase of a "Paramobile:" a specialized wheelchair-type device that allows him to stand upright. Adopting the opinion of the self-insurer's medical expert, Dr. Jerome Siegel, the judge found the Paramobile was not a reasonable and necessary medical treatment.[1] (Dec. 7.) On the adopted medical evidence, we agree that the Paramobile is not an adequate or reasonable treatment. Amon's Case, 315 Mass. 210 (1943)(judge free to adopt all, part or none of expert medical opinion evidence). The judge also determined the Paramobile was not within the scope of the "mechanical appliance" clause of § 30, which provides for the payment of devices that "will promote [the employee's] restoration to or continue him in industry." Because the judge construed the "mechanical appliance" clause too narrowly, we reverse that portion of the decision

[1] Section 30 sets out an arguably broader standard, i.e., "[t]he insurer shall furnish to an injured employee adequate and reasonable health care services . . . so long as such services are necessary." Although commonly used, the statutory support for the "reasonable and necessary" standard is nonexistent. Lewin v. Danvers Butchery, Inc., 13 Mass. Workers' Comp. Rep. 18, 19-20 n.1 (1999)(" '[a]dequate and reasonable' relates to the nature of the hospital or medical services" whereas " '[n]ecessary' relates to the length of time an employee may be entitled to such health care services. It was added to the statute in 1948 when the duration of medical benefits was expanded to an indefinite period from what had earlier been limited to a few weeks.")

and recommit the case for further findings and rulings consistent with our interpretation of § 30 that follows.

On June 1, 1999, the employee was in a work-related motor vehicle accident sustaining multiple severe injuries including a resultant T-6 paraplegia. (Dec. 3.) On June 25, 2002, an administrative judge approved a lump sum settlement agreement between the employee and the self-insurer on an accepted liability basis under § 48(2). Subsequently, while working with other wheelchair-bound individuals as a volunteer at Spaulding Rehabilitation Hospital and the Greater Boston Chapter of National Spinal Cord Injury Association, the employee learned about the Paramobile.

The employee was able to convince a sales representative of Parabase Technologies, the device's manufacturer, to allow him to sample the Paramobile. (Dec. 4.) After using it, the employee requested that the self-insurer purchase the machine. (Dec. 4.) Despite the self-insurer's denial of his request, the employee continued to develop his relationship with the Paramobile sales representative and, as a result, he was able to secure the use of a Paramobile in exchange for appearing at various functions and becoming a de facto spokesperson for the device.[2]

The loaned Paramobile allows the employee to be active outdoors, play ball with his children, and golf. (Dec. 5.) It is a large motorized wheelchair that enables the user to assume a standing position. The device is marketed as sports-assistive, allowing the user to play golf, fish, and generally perform outdoor activities that a wheelchair -bound individual could not otherwise perform. Its size renders it unusable inside buildings with standard-width doorways.[3] (Dec. 5.)

---

[2] The employee testified to appearing at eight to ten events with the Parabase Technologies sales representative, including golf tournaments and a Department of Defense event in Portland Maine; appearing on the sales representative's website with the Governor of New Hampshire and at the World War II Memorial in Washington, D.C.; and appearing on television locally and nationally on Good Morning America. (Tr. 33-41.)

[3] The employee did not bring the device to the courtroom because it did not fit through the courtroom door. (Dec. 5; Tr. 52.) The employee testified that he used the device inside his home and at the Spaulding Rehab. (Tr. 45-46.)

Only the employee testified at the hearing. In addition to his testimony, the employee submitted a letter from David Estrada, the director of the Greater Boston Chapter of National Spinal Cord Injury Association, for whom the employee volunteers. In his letter, Mr. Estrada stated that the use of the Paramobile would allow the employee to perform his volunteer functions for longer periods of time. (Dec. 7.) The self-insurer submitted a report from a vocational expert, Michael LaRaia, who concluded that the Paramobile would not increase the employee's employment opportunities. (Dec. 6.)

In his general findings and rulings of law, the judge noted that the employee had not increased his hours as a volunteer and stated, "[f]urther while the employee hopes that a paid position may come from his volunteer work, no evidence was submitted that such an eventuality was forthcoming much less contingent on his having the Paramobile." The judge then found the vocational expert, Michael LaRaia,

[N]oted that there was no plan in place that utilized or contemplated using the device in an effort to return to work. Mister LaRaia contended that such a plan would be the first step in the vocational process so that the introduction of such a mechanical device made sense. He noted that any realistic assessment of vocations that the employee may be able to return to would be equally accessible by means of a traditional wheel chair. He concluded that the device would not increase the employee's employment opportunities. I have adopted Mr. LaRaia's opinion and find no convincing evidence sufficient to dispute this conclusion.

(Dec. 8.)

We conclude that the judge's analysis of the issue is too narrow, resulting in his setting a standard for recovery that is more restrictive than contemplated by § 30. Section 30 states, in relevant part:

> In any case where an administrative judge, the reviewing board, the office of education and vocational rehabilitation or the health care services board is of the opinion that the fitting of an employee eligible for compensation with an artificial eye or limb, or other mechanical appliance, will promote his restoration to or

> continue him in industry, it may be ordered that such employee be provided with such item, at the expense of the insurer.[4]

The judge's reasoning, in effect, required the employee to show that his receipt of the device would in fact result in his return to a job in the open labor market. In support of his ultimate conclusion, the judge cited our decision in Stevens v. Northeastern University, 11 Mass. Workers' Comp. Rep. 167 (1997)(mechanical appliance provision of § 30 may allow for transportation assistance up to and including a van). In Stevens, we defined the standard for "mechanical appliance" as having a "positive effect on an 'injured employee's ability to hold a job or obtain a new position.' " Id. at 170, citing Scheffler's Case, 419 Mass. 251 (1994). That the employee in Stevens had a job to which she needed to commute does not set the outer boundary for the provision's application.

All that is necessary is that the device, "promote [the employee's] restoration to . . . industry." G. L. c. 152, § 30. Synonyms for "promote" are "advance," "improve," or "further." By using the term "promote," the Legislature looked toward the employee's potential for employment. Moreover, by coupling the term "promote" with the terms "restoration to industry," the Legislature described the compensable mechanical appliance as playing a part in an active or ongoing process, not necessarily as the primary means to that end. Inherent in this language is the acknowledgement of the premise that an employee's "restoration to industry" is dependent upon the interplay of a multitude of factors. As stated by the Supreme Judicial Court:

> Physical handicaps have a different impact on earning capacity in different individuals. Education, training, age, and experience affect the ability to cope with the physical effect of an injury. The nature of the job, seniority status, the attitudes of personnel managers and insurance companies, the business prospect of the employer, and the strength or weakness of the economy also influence an injured employee's ability to hold a job or obtain a new position.

Scheffler's Case, supra. at 256, citing L. Locke, Workmen's Compensation § 321, at 375-376 (2d ed. 1981).

---

[4] Although the parties have not urged us to do so, we note that the statutory language suggests that we may make such determinations on our own. However, the matter has come to us on appeal under § 11C which clearly does not permit the reviewing board to engage in the fact finding necessary to make such a determination.

We conclude the statutory phrase, "will promote his restoration to industry," requires the administrative judge to engage in a comprehensive analysis of all the factors that influence the employee's likelihood of achieving active participation in the open labor market, and to make a determination as to whether the mechanical appliance will have a positive impact on any or all of those factors so as to aid in the process of returning the employee to active participation in the open labor market.[5] Here, the judge's decision fails to show that he engaged in any such analysis after adopting Mr. LaRaia's opinion. Mr. LaRaia's opinion was contained in a report that was generated prior to the hearing. (Ex. 4.) As a result, in addition to employing the heightened standard imposed by the judge, Mr. LaRaia did so in a vacuum without considering any of the other specific facts of the case, and without any consideration of the impact that the use of the device has or may have on this employee's potential to return to work.[6] (Ex. 4, pp. 1-4.) Thus, notwithstanding the judge's specific findings crediting the employee's testimony that his life had improved since he began to use the Paramobile,[7] and that the Paramobile allowed him to relieve his back pain outside of the confines of his home by transitioning into a standing position, the judge conducted no analysis as to whether those factors had any potential impact on the employee's return to the open labor market. Because recommittal is necessary under the circumstances, we transfer the case to the senior judge for reassignment to another administrative judge for hearing de novo on the disputed issue.[8]

So ordered.

---

[5] The statutory inclusion of "artificial eye" within the realm of such "appliances" points toward this conclusion. G. L. c. 152, § 30. Clearly, fitting an employee with an artificial eye will not improve the employee's vision or alter the employee's physical ability to perform any tasks.

[6] Indeed, Mr. LaRaia repeatedly opined throughout his report that the device was not a "vocational necessity." (Ex. 4, pp.1-4.) His opinion was based on the length of time that the employee has received Social Security Disability Benefits, the lack of a vocational plan requiring the use of the device, his opinion that all sedentary jobs may be accommodated with the use of a wheelchair, and his consideration of the language of the Americans with Disabilities Act and "EEOC" guidelines regarding "reasonable accommodation." Id.

[7] The employee provided specific testimony regarding the effect that the Paramobile had on his ability to interact with other individuals and the reactions that individuals have when they see him standing in the machine. (Tr. 16, 18-19, 22.)

[8] Because the administrative judge no longer serves with the department, the recommittal proceedings must be de novo.

_____
Catherine Watson Koziol
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

Filed: ***December 12, 2008***