

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 009494-01

Robert B. Wilson
M.P. Management Co., Inc.
Granite State Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Costigan and Horan)

APPEARANCES
John F. Folan, Esq., for the employee
James M. Ramsey, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision awarding the employee, a tractor-trailer truck driver, permanent and total incapacity benefits pursuant to G.L. c. 152, § 34A. The employee injured his back, neck and head in a fall while working on March 9, 2001. The insurer accepted liability for this injury, but now contends that the employee's incapacity is no longer attributable to it. (Dec. 1-2.) We agree with the insurer that the judge's incapacity analysis is flawed, and therefore recommit the case for further findings.

The primary symptoms that continue to hinder the employee are dizziness and vertigo, due to traumatic labyrinthitis with residual peripheral vestibulopathy resulting from the March 9, 2001 injury. (Dec. 5.) The employee subsequently injured his right shoulder in July 2002, when he turned his head quickly, lost his balance, and fell down the basement stairs in his home. The employee also suffers from a non-work-related heart condition and underactive thyroid, as well as diabetes. (Dec. 4.)

The employee submitted to an impartial medical examination on June 2, 2004. The impartial physician – a neurologist – opined the employee was at a medical end result, with a permanent disability that would preclude him from returning to his usual and customary form of employment, due to his vestibular difficulties. The impartial

physician did not have an opinion regarding disability resulting from the employee's shoulder injury. (Dec. 5-6, Stat. Ex. 1.)

In his vocational analysis, the judge noted the fifty-nine year old employee's limited education and lack of sedentary employment experience. He then turned his attention to an analysis of the employee's medical condition:

Medically, he continues to experience dizziness regularly and is able to do little during the day. Records submitted support the employee's continued treatment for that condition following his injury.^[1] Additionally, he has difficulty with his right shoulder when he attempts to lift or raise his right arm above shoulder height. Therefore, after reviewing all the evidence in this matter and considering the employee's age, training, experience and limitations imposed as the result of his industrial injury, I find that the employee remains totally incapacitated and the insurer's request to modify or discontinue must be denied.

(Dec. 9.) Based on office notes of the employee's treating physician, the judge found the employee's incapacity permanent, and awarded § 34A benefits effective as of the exhaustion of § 34 benefits. (Dec. 10.)

The insurer contends the judge erred by including the work-related right shoulder impairment in his incapacity analysis, because there was no medical evidence establishing any measure of disability associated with that condition. The insurer is correct, and recommitment is therefore appropriate for a reexamination of the employee's incapacity status, without reference to his shoulder. See Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682-683 (1995); Hummer's Case, 317 Mas. 617, 620, 623 (1945)(incapacity assessment must be based only on work-related disability). It was the employee's burden to show, through expert medical evidence, that his right shoulder impairment was disabling. See Josi's Case, 324 Mass. 415, 418 (1949). This he did not do.

Accordingly, we recommit the case for further findings consistent with this opinion. We summarily affirm the decision with respect to the insurer's other arguments on appeal.

¹ The judge allowed the parties to submit additional medical evidence on the unopposed motion of the insurer, claiming both inadequacy of the § 11A report and medical complexity. (Dec. 2.)

Robert B. Wilson
Board No. 009491-01

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: **December 18, 2007**