

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 036002-15

Norma Feliciano
BWAY Corporation
Travelers Casualty and Surety Co. of America

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Long, Koziol and Calliotte)

This case was heard by Administrative Judge Maher.

APPEARANCES

William R. Trainor, Esq., for the employee
Edward E. McCarthy, Jr., Esq., for the insurer

LONG, J. The insurer appeals from a decision awarding ongoing § 34, temporary total incapacity benefits, arguing the findings are inconsistent with the evidence presented. We affirm the decision.

The employee's claim for §§ 34, 13 and 30 benefits was conferenced before the judge on April 27, 2016, and an order for all benefits claimed was issued. The insurer timely appealed, and a de novo hearing was held May 31, 2017, at which the insurer contested all aspects of the claim, including initial liability, disability and causal relationship. The employee was the only witness to testify at the hearing, and the impartial report of Dr. Alan Ertel was found to be adequate; however, additional medical records were allowed due to a finding of medical complexity by the judge. (Dec. 2-3.)

The employee was fifty-three years-old at the time of the hearing and has an eighth-grade education. For approximately nineteen years, she worked at machines that make plastic buckets, a job that was "strenuous, repetitive, and required constant use of both hands and arms during a workday producing an astonishing number of buckets and lids." (Dec. 5.) In the summer of 2015 the employee began to have numbness in her hands and left work to have surgeries on October 20, 2015, and in November 2015. The

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employee attempted to return to work on January 11, 2016, but was sent home after a few hours due to throbbing pain in her hands and numbness in her fingers. Id. at 5-6. The judge found liability for bilateral carpal tunnel injuries and ordered ongoing § 34 benefits, as well as medical benefits pursuant to §§ 13 and 30. (Dec. 12.)

The insurer argues the judge erred because the findings that address some of the employee's physical restrictions are inaccurate and do not reflect the employee's actual testimony at hearing. It contends,

In support of his decision to keep the claimant on Section 34 benefits, the Hearing Judge wrote, "She can no longer do some chores around the house such as laundry, preparing food, such as cutting meat, and she cannot carry the grocery bags after shopping." (P.6 of Decision) Travelers would argue that those stated conclusions are inaccurate. In her testimony on page 27 of the transcript, the Claimant stated, "I have difficulty doing the laundry. I have difficulty taking a knife and cutting meat. I have difficulty doing my hair." (P 27 Lines 18-20) While on the witness stand, the claimant also stated, "Yes I do what I have to do in my house. I do the laundry. I do cooking, things that I have to do around the house." (P. 29, Lines 13-15) The claimant further testified, "I have difficulty if I go to do groceries. I have difficulty carrying the bags." P 27 Lines 22 & 23)

(Insurer br. 2.)

The insurer accurately highlights discrepancies between some of the hearing testimony and some of the findings in the hearing decision that reference the testimony. However, the judge also accurately recounts the employee's precise hearing testimony when he finds,

The work place bilateral hand and wrist injuries have left ongoing pain and hand numbness. She has constant numbness in her fingertips that prevent [sic] her from performing fine motor activities with her fingers. She credibly testified that she has trouble with some activities of daily living such as brushing her hair and has difficulty gripping/lifting/handling objects with both hands. Surgeries on the right hand on October 21, 2015 and on the left hand on November 18, 2015 have not relieved her symptoms.

(Dec. 9.)

In this context, the noted discrepancies are minor and not mischaracterizations of the evidence that would require reversal or recommittal as requested by the insurer.

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Furthermore, the insurer does not advance any reasoned argument as to how the discrepancies render the decision arbitrary, capricious or beyond the scope of the judge's authority. Additionally, the medical evidence adopted by the judge fully supports his finding of temporary total incapacity.¹ In light of the many additional proper findings made by the judge, including that "[h]er fingertips remain numb and the palms of her hand are painful," (Dec. 6.), we find no reversible error resulting from the minor discrepancies between the hearing testimony and findings. Caron v. Resi Comm. Construction, 6 Mass. Workers' Comp. Rep. 167, 169 (1992)(discrepancies between testimony reported by judge and actual testimony would be harmless if totality of evidence supported judge's final decision).

The insurer also claims error because the decision "is simply not consistent with the evidence presented." (Insurer br. 4.) It argues:

The claimant clearly has a working capacity. She has been given legal custody of the 3 grandsons and she receives \$1,600 per month from the Commonwealth of Massachusetts because she is the designated foster mother of the two oldest boys. (PP. 40-42)

....

The claimant in the instant case continues to receive \$1600 per worker [sic] per month for her care of her two oldest grandsons. Her current duties include driving her grandsons to practice, school and doctor's appointments. She purchases groceries, cooks and launders her grandsons' clothes. At the very least, this Claimant has a significant earning capacity. The Hearing Judge's Decision is simply not consistent with the evidence presented.

(Insurer br. 3-4.)

¹ The judge adopted Dr. Montilla's opinion that due to the loss of sensation in the fingertips, her fine motor skills and ability to use her fingertips is permanently affected and it is unlikely that she will be able to do repetitive work that requires the use of fine motor skills due to the loss of sensation. (Dec. 8.) The judge also adopted Dr. Ertel's opinion that the employee appears to be disabled at the present time and the physical limitations are imposed to the use of her hands for her work activities. (Dec. 8.)

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Here again, the insurer does not present any legally cogent argument in support of its position, attempting instead to buttress its argument with facts not found in the decision. The insurer's complaint that the decision "is simply not consistent with the evidence presented" lacks substance, and we reject it.

Regarding the employee's monthly foster care subsidy, the judge was correct not to factor the subsidy into his evaluation of the employee's incapacity, since G. L. c. 152, § 38 prohibits consideration of such collateral source income.² While evidence of collateral source income is admissible to address an employee's motivation to return to work, McKenna v. New England Telephone, 2 Mass. Workers' Comp. Rep. 38, 39 (1988), the judge here found that "[s]he is to be commended for taking on the foster care commitment of her three grandchildren which she did prior to her injuries while working and carries on despite her limitations but with the help of her own daughter and son." (Dec. 10.) As the employee persuasively notes, "because for four and a half years she worked full time while receiving essentially the same subsidy, this would nullify any assertion that this monthly subsidy is an incentive for her to remain out of work."³ (Employee br. 3.) We agree, and affirm the hearing decision.

² M.G.L. c. 152, § 38 provides as follows:

Except as expressly provided elsewhere in this chapter, no savings or insurance of the injured employee independent of this chapter shall be considered as determining compensation payable thereunder, *nor shall benefits derived from any other source than the insurer be considered in such determination.*

(Emphasis added.)

³ We note that 110 Code Mass. Regs. § 7.104(4), "Standards for Licensure as a Foster/Pre-adoptive Parent," specifically earmarks such subsidies for the benefit of the foster child and provides that "[f]oster/adoptive reimbursement and subsidy shall be used to meet the individual needs of the child." Also, as a matter of law, such subsidies are not taxable income since the Internal Revenue Code, 26 U.S.C.S. § 131, entitled "Certain Foster Care Payments" states,

- (a) General Rule. Gross income shall not include amounts received by a foster care provider during the taxable year as qualified foster care payments.

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Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay the employee's attorney a fee in the amount of \$1,654.15.

So ordered.

Martin J. Long
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: **September 7, 2018**