COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 095111-88**

Alice Moriarty	Employee
Easco Hand Tools, Inc.	Employer
Wausau Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Wilson)

APPEARANCES
Charles R. Casartello, Jr., Esq., for the employee
Lewis Evangilidis, Esq., for the insurer at hearing
Patricia M. Vachereau, Esq., for the insurer on brief

MAZE-ROTHSTEIN, J. The employee appeals from a decision denying her claim for G.L. c. 152, § 34A, permanent and total incapacity weekly benefits and instead awarding § 35 partial incapacity benefits. Finding merit in the employee's appeal, we recommit for further findings.

Alice Moriarty was sixty-seven years old at the time of the hearing. A native of Ireland, she immigrated to the United States in 1959 where she performed manual labor in factories. She began working as a machine operator for the subject employer in September 1972. In 1977 she slipped and fell at work, fracturing the radial head of her right elbow. The proximal radial head was surgically excised in 1979, followed by an anterior transplant of the right ulnar nerve in 1980. Ms. Moriarty returned to her repetitive work for the employer, until 1988 when she succumbed to right wrist and elbow pain. In 1989 she underwent carpal tunnel surgery for her pain. Her pain worsened after the surgery. (Dec. 2; Employee ex. 1; Insurer br. 1.)

The insurer paid § 34 benefits from October 13, 1988 through May 31, 1990 and § 35 benefits, with a $170.00 assigned earning capacity from June 1, 1990 through June 30, 1995. During that time, the insurer filed a complaint to discontinue or further modify the employee's benefits. The insurer's complaint was denied in a 1994 hearing decision.

Thereafter, the employee filed a claim for additional § 34 benefits. A § 10A conference was held and an order awarding the claimed benefits issued. (Dec. 2; Employee br. 1; Insurer br. 2.)

In 1998 the employee filed a claim for § 34A permanent and total incapacity benefits. Following a § 10A conference, the insurer was ordered to pay § 35 partial benefits based on an assigned earning capacity of $50.00. The employee appealed giving rise to a hearing de novo before the same administrative judge who had heard the case in all the prior proceedings. Pursuant to § 11A, the employee was examined by a neurosurgeon.[1] The doctor diagnosed several conditions resulting from Ms. Moriarty's original work injury, including arthritis of the metacarpal trapezial joint, a sequela of the surgical procedures. The physician concluded that Ms. Moriarty was at a medical end result with residual partial medical disability. He restricted her from any sort of moderate or heavy lifting. In his hearing decision, the administrative judge adopted the § 11A opinion, denied the employee's § 34A claim and ordered the insurer to continue paying the § 35 benefits ordered at conference. (Dec. 2; Employee br. 1-2; Insurer br. 2.) The employee appeals, arguing error in the earning capacity determination.

"The determination of loss of earning capacity involves more than a medical evaluation of the employee's physical impairment. Physical handicaps have a different impact on different individuals. Education, training, age and experience affect the ability to cope with the physical effect of injury. The nature of the job, seniority status, the attitudes of personnel managers and insurance companies, the business prospects of the employer, and the strengths and weakness of the economy also influence an injured employee's ability to hold a job or obtain a new position." Scheffler's Case, 419 Mass. 251, 256 (1994).

In his subsidiary findings of fact, the judge noted that the § 11A physician's restriction would not be especially severe in the open labor market but for Ms. Moriarty's

[1] In his decision, the administrative judge stated that the impartial examination was performed by Dr. Marc Linson. (Dec. 3.) A review of the exhibits shows that the impartial examiner was Dr. Steven Silver. (Statutory Ex. 1.)

factory work history and her total lack of experience in clerking or sales. He recounted the employee's unsuccessful effort to find work in 1991 and 1992 in food service and bagging at a supermarket because her right upper extremity restriction presented too great an obstacle. The judge also found that after § 30G and § 30H vocational training and guidance in 1994, Ms. Moriarty received only one job offer that the prospective employer withdrew upon learning of her limitations. (Dec. 3.)

In his general findings, the judge acknowledged that Ms. Moriarty's physical restrictions remained unchanged from 1994 and 1995, when the employee was placed on § 34 benefits. He found that the employee's "personal situation has not changed," but the labor market had in that "the general economy is much stronger, and the need for workers has increased." (Dec. 4.) In denying the employee's § 34A claim, the judge concluded that, given this change in the economy, the employee must show recent evidence of an inability to find a job, even though she was and remains "on the fringe of those who may be employable." (Dec. 5.)

The judge erred in finding no change to the employee's "personal situation" and in requiring a contemporaneous job search to prove permanency of her incapacity. First, there is no legal requirement to conduct a job search where it would be futile, a point not acknowledged by the judge. See Ballard's Case, 13 Mass. App. Ct. 1068 (1982). For "[n]either the insurer, trying to prove that the employee is able to return to [her] usual line of work, nor the employee, trying to prove [her] [permanent and] total incapacity, is likely to proffer evidence that, if persuasive, would tend to compromise its or [her] position." Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988). Moreover, as argued by the employee, her personal situation had changed significantly. (Employee br. 2-3.) In 1994 Ms. Moriarty was sixty-three years old, two years younger than the usual age of retirement. At the urging of the judge in his 1994 decision, the employee pursued vocational rehabilitation pursuant to § 30G and § 30H. (Dec. 3 and Dec., dated December 7, 1994, 3-4.) Despite an intensive job search, via a vocational plan paid for by the insurer, her effort to find work failed. (Dec. 3.) At the subject hearing, the employee was sixty-seven years old, two years beyond the usual retirement age.

Vocational services are no longer available to her under the Act.[2] That four year age difference and her ineligibility for further vocational services under c. 152 are definite changes in her "personal situation" that undoubtedly impact her employability, and must be considered in determining earning capacity.

"The goal of disability adjudication is to make a realistic appraisal of the medical effect of a physical injury on the individual claimant and award compensation for the resulting impairment of earning capacity, discounting the effect of all other factors. . . ." Scheffler, supra (citations omitted). On recommital, the judge must reappraise Ms. Moriarty's earning capacity in light of her personal changes, and may in his discretion consider the current economic changes.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: June 12, 2001

[2] The employee was entitled to only one vocational program through the Act as "the insurer shall not be liable for the cost of multiple or successive rehabilitation programs. . . ." 452 Code Mass. Regs. § 4.08(1).