

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 053149-97

Amy Storch
Blue Cross/Blue Shield of Massachusetts
Liberty Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Maze-Rothstein, McCarthy and Wilson)

APPEARANCES

Rosario M. Rizzo, Esq., for the employee
Clyde Kelton, Esq., for the insurer

MAZE-ROTHSTEIN, J. The employee appeals from a decision that reduced her weekly compensation benefits from G.L. c. 152, § 34 temporary total to § 35 partial weekly incapacity benefits, based on an assigned earning capacity of \$276.51 per week. The employee contends that equating her unpaid part-time psychotherapy work with profitable employment of that nature was error. Because we agree with the judge that the employee's self-employment for charity could rightly be assessed as part of the employee's vocational profile, we affirm the decision.

Amy Storch is a social worker, who was forty-six at the time of the hearing. She has a master's degree in social work. One wintry afternoon, December 31, 1997, when returning from lunch, Ms. Storch slipped and fell on ice in the employer's lot, striking her left knee on cement stairs. The insurer accepted the work injury and voluntarily paid benefits. (Dec. 3; Tr. 6, 11.) Repair of her knee required two surgeries. (Dec. 4.)

The employee's § 34 benefits were left intact after a § 10A conference on April 20, 1999. (Dec. 2.) The employee was examined, pursuant to § 11A, on June 17, 1999. The § 11A doctor opined that the left knee injury and residual restrictions were causally related to the 1997 work injury. The physician limited the employee's walking and standing to no more than ten continuous minutes. He felt that she needed to be able to

Amy Storch
Board Number 053149-97

change positions at will, should avoid stairs, and that she could sit with her leg extended for up to one hour. (Dec. 4.) The employee underwent a second surgery on her knee one month after the § 11A examination. Her symptoms remained the same in spite of that procedure. (Dec. 4-5.)

The judge allowed additional medical evidence for the purpose of addressing the employee's status post-surgery in 1999. In the § 11 hearing, the judge adopted the opinions of the § 11A examiner. She concluded that the employee was partially incapacitated due to her work-related knee injury, and analyzed her medical and vocational status as follows:

I find that due to the residuals of the December 1997 work injury the employee cannot do her past duties at Blue Cross/Blue Shield and moreover cannot return to full time work. She cannot achieve her pre-injury \$1106.03 average weekly wage.

The employee nonetheless is able to continue to some minor extent the small clinical practice she began in 1995, prior to the industrial injury. She rents a small Lexington office, and counsels a few indigent clients, who are lacking insurance and do not pay her. (Tr. 18-19.) There is no evidence that she has earnings. Counsel for the insurer stipulated that these counseling activities by the claimant were no bar to her collecting total incapacity compensation prior to hearing. (Tr. 29.) The insurer contends, however, that the counseling activity indicates she has some earning capacity. *Id.*

The employee at forty-six is relatively young, and she has an advanced degree and skilled work experience in social work. She is able to drive from her home in Lincoln to her office in Lexington, ten minutes away. See (Tr. 10.) She is capable of functioning as a psychotherapist for the course of a fifty-minute session, for one or two clients per day. She can then type her case notes. While this psychotherapist activity is unpaid, it is activity that could produce earnings if Ms. Storch were to counsel paying clients instead of indigent clients. See Scheffler's Case 419 Mass. 251, 256 (1994). She has demonstrated an ability to counsel up to two clients a day. There is no evidence that she cannot do that five days a week. While she is dependent on narcotic pain medication for work related pain, there was no testimony to indicate she could not function adequately in her part time psychotherapy tasks in view of the medication. Considering her skills and work related limitations in relation to the open job market, and her actual work-like activity, albeit unpaid at present, she has the capacity to earn on the open labor market for ten hours per week.

(Dec. 7-8.) Accordingly, the judge assigned an earning capacity which reflected one quarter of her full time average weekly wage, \$276.51 per week. (Dec. 8.)

It is axiomatic that compensation benefits are awarded “not for the injury as such but rather for an impairment of earning capacity caused by the injury[.]” Zeigale’s Case, 325 Mass. 128, 129-130 (1949), and that the assessment of an employee’s post-injury earning capacity is not limited to the job in which she was injured. Federico’s Case, 283 Mass. 430, 432 (1933). See G.L. c. 152, § 35D. Earning capacity instead reflects “the whole monetary result of a reasonable use of all [the employee’s] powers, mental and physical, whether working for others or for [herself]” Federico’s Case.

The judge did not err by interpreting the employee’s *unpaid* psychotherapy activity as indicative of “the whole monetary result of a reasonable use of all” the employee’s “powers” and skills that could enable her to make some amount of regular earnings. She attested to a rich background of skilled work experience in her field.¹ As it was the employee’s burden to prove any degree of incapacity, it is clear that the judge simply was unpersuaded that the employee was precluded from doing any type of work, given her advanced education, accomplishments in her professional field and her “work-like activity.” (Dec. 7.) See Mulcahey’s Case, 26 Mass. App. Ct. 1, 3 (1988).² The judge’s use of the employee’s work-like psychotherapy activities as part of the basis for finding an earning capacity in the open job market, was well within her discretion. See Id.; Scheffler’s Case, 419 Mass. 251, 256 (1994).

¹ The employee testified that she worked full time as an executive secretary while in school. Upon receipt of her master’s degree, she related that she worked as a clinical social worker, an outreach worker, and as a supervisor of social worker clinicians. (Tr. 12-18.)

² The employee argues that the administrative judge’s earning capacity analysis ignores the overhead expenses, which would inevitably attend self-employment. (Employee br. 4, 5.) The argument fails because the judge based her earning capacity determination on the employee’s professional training and experience and did not speculate on what earnings could be derived from the existing unpaid counseling activity.

Amy Storch
Board Number 053149-97

Accordingly, we affirm the decision.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: June 11, 2001