COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 022032-98**
Deborah DiBona	Employee
M.B.T.A	Employer
M.B.T.A	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Horan)

APPEARANCES
Gerard A. Butler, Esq., for the employee at hearing
Gerard A. Butler, Esq., and Kathleen Greeley, Esq., for the employee on brief
John C. White, Esq., for the self-insurer at hearing
John C. White, Esq., and Richard W. Jensen, Esq., for the self-insurer on brief

McCARTHY, J. The self-insurer challenges an administrative judge's award of weekly § 34A permanent and total incapacity benefits on the ground that the judge took judicial notice of a fact not susceptible of such notice. We agree with the self-insurer that the judge erred, but deem the error harmless. Therefore, we affirm the decision.

Deborah DiBona, who has a high school degree and has taken several college courses in nursing and childcare, was forty-eight years old at the time of hearing. (Dec. 3-4.) On June 18, 1998, she injured her back when the trolley she was driving collided with the one in front of it. (Dec. 5.) The self-insurer accepted liability for her injury, and paid weekly § 34 temporary total incapacity benefits until they expired on June 17, 2001. Following a § 10A conference, an administrative judge awarded the employee ongoing weekly § 35 partial incapacity benefits. The employee appealed to a de novo hearing, claiming entitlement to § 34A permanent and total incapacity benefits. (Dec. 3.)

The § 11A physician, Dr. Robert Feliz, opined that the employee had "failed post-surgical lower back pain with left sciatica caused by the development of post-surgical scarring and trapping [of] the S1 nerve root" which was causally related to the work

incident. (Dec. 7.) He opined that " 'any prolonged sitting, walking or any significant degree of bending, twisting or heavy lifting, in particular greater than or equal to ten pounds will exacerbate her pain and complicate her ongoing pain management.' " (Dec. 8.) Dr. Feliz felt that the employee was permanently disabled and had reached a medical end result. (Dec. 7, 8.) However, he concluded that she " 'may be able to perform work-related activity especially if the activities require minimal physical demand and involve using mostly the upper body and arms and also if frequent breaks to change position are permitted.' " (Dec. 8.)

The judge adopted the medical opinion of the impartial examiner, including his opinion that the employee was at an end result regarding her chronic pain condition. (Dec. 9.) Despite Dr. Feliz's opinion that the employee might have some partial work capacity, the judge credited the employee's testimony that, due to her pain, her inability to sit or stand for more than a few minutes, and her inability to concentrate, she could not fulfill the requirements of any job, including her former positions of trolley driver, cashier and day care provider. (Dec. 8-9.) He further found that, even though she had taken some courses in nursing, she had neither the experience nor the ability to perform a nursing job. (Dec. 8.) Finally, he adopted the opinion of the vocational expert that her constant pain and inability to concentrate or sit for any period of time rendered her incapable of doing even sedentary work. (Dec. 9.) Finding her permanently and totally incapacitated, the judge ordered the self-insurer to pay the employee § 34A benefits beginning on June 18, 2001. (Dec. 10-11.)

The self-insurer's appeal challenges the judge's finding that, "[i]t is a judicially noticed fact that persons over forty-one [are] in the highest unemployable group." (Dec. 8.) The self-insurer maintains that by taking judicial notice of a "fact" of which judicial notice could not properly be taken, the judge based his finding of permanent and total incapacity, in part, on facts not in evidence. We agree with the self-insurer that the age range of the most unemployable group of workers is not a fact susceptible of judicial notice. However, we deem the error harmless as the judge's conclusion that the employee is permanently and totally incapacitated is amply supported by other evidence.

"Factual matters which are 'indisputably true' are subject to judicial notice; these include '[m]atters of common knowledge or observation within the community.' " Yankee Atomic Elec. Co. v. Secretary of the Commonwealth, 402 Mass. 750, 759 n.7 (1988), quoting Nantucket v. Beinecke, 379 Mass. 345, 352 (1979). See also Dembitski v. Metro Flooring, Inc., 13 Mass. Workers' Comp. Rep. 348, 355-356 (1999). Judicial notice does not extend to a judge's own personal knowledge or observations. See Nantucket, supra; Furtado v. Furtado, 380 Mass. 137, 140 n.1 (1980). Contrast Mulcahey's Case, 26 Mass. App. Ct. 1 (1988)(where court sanctioned adjudicatory expertise of administrative judges on earning capacity issues). The relative employability of a certain age group is neither indisputable nor commonly known, and the judge erred by factoring it into his incapacity analysis. See also P.J. Liacos, Massachusetts Evidence § 2.8.2 (7th ed. 1999)(collecting cases).

However, we do not see how the self-insurer was harmed by this error where the other evidence upon which the judge relied overwhelmingly supports his finding of permanent and total incapacity. See Bendett v. Bendett, 315 Mass. 59, 65-66 (1943). An error in the admission or exclusion of evidence (to which the taking of judicial notice is analogous) requires reversal only where it goes to a pivotal factual finding and where there is a substantial risk of injustice. Indrisano's Case, 307 Mass. 520, 523 (1940). While age is clearly one of the factors to be considered by the judge in conducting his vocational analysis, Scheffler's Case, 419 Mass. 251, 256 (1994), the judge's opinion that people in the employee's age group were the most unemployable was not the determining factor in his decision. Rather, the judge clearly factored into his analysis Ms. DiBona's medical condition as described by Dr. Feliz, the vocational expert's opinion, the employee's work experience and education, her complaints of pain, and his own observations of her at hearing. Ultimately it was her credible testimony regarding her "unremitting pain, discomfort and inability to concentrate," that tipped the scale toward a finding of permanent and total incapacity. (Dec. 9) There was no error in this finding, even though Dr. Feliz opined that she might have some partial work capacity. (Dec. 8.) See Tran v. Constitution Seafoods, 17 Mass. Workers' Comp. Rep. 312, 318-319

(2003)(judge may consider employee's pain to find total incapacity despite a medical opinion that employee has some physical ability to work).

Since the judge's unchallenged findings, standing alone, are sufficient to support an award of permanent and total incapacity benefits, we affirm the decision. Silva v. Masterson Constr. Co., 17 Mass. Workers' Comp. Rep. 444, 446 n.1 (2003).

Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,312.21.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***November 10, 2004***

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge