COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 056565-98**

Georgia Giannakopoulos	Employee
Boston College	Employer
Boston College	Self-insurer

REVIEWING BOARD DECISION

(Judges Carroll, McCarthy and Horan)

APPEARANCES

Robert F. Gabriele, Esq., for the employee
George D. Kelly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

CARROLL, J. The self-insurer appeals an administrative judge's award of permanent and total incapacity benefits for an employee's 1998 bilateral carpal tunnel syndrome and flexor tenosynovitis of the left thumb, due to her work in food preparation and service for the employer. We affirm the decision for the reasons that follow.

After leaving work due to pain in 1998, the employee underwent both a left and right open carpal tunnel release, as well as a left trigger thumb release. These procedures provided only partial relief of her symptoms. In a hearing decision issued in 2002, the employee was awarded weekly § 34 temporary, total incapacity benefits for her medical condition. Following exhaustion of § 34 benefits, she began receiving maximum § 35 partial incapacity benefits.[1] (Dec. 4.) In the proceeding at hand, the employee claims weekly § 34A permanent and total incapacity benefits. (Dec. 2.) Pursuant to § 11A(2), the employee was examined by Dr. Christian Sampson. (Dec. 5.) Dr. Sampson had also provided the § 11A medical testimony in the prior hearing. (Dec. 1, 5.) The judge's

[1] The § 35 benefits were apparently paid per the parties' agreement, and later were ordered as a result of the § 10A conference in this proceeding. (Dec. 2, 4.)

medical and vocational findings are set out in detail below. The judge credited the employee's account of her pain and limitations, adopted the impartial physician's opinion that the employee was disabled from any work requiring lifting of more than 20 pounds and/or any repetitive tasks, and awarded the employee the § 34A benefits claimed. (Dec. 5-6.)

The self-insurer argues that the judge performed an inadequate vocational analysis under Frennier's Case, 318 Mass. 635 (1945). (Self-insurer's brief, 12-15.) We disagree. The judge's general findings quite adequately address the employee's age of fifty-six years, limited education, limited ability to speak English, and very limited transferable skills. (Dec. 4-6.) See infra. There was no error.

The self-insurer argues from Ballard's Case, 13 Mass. App. Ct. 1068 (1982), that the employee failed to make a required showing in support of her claim for § 34A benefits, that she had attempted to secure employment. (Self-insurer's brief, 8-12.) Again, we do not agree.

Ballard's Case was a recommittal for clear and definite findings on "the range and types of activities" for which the employee could be found to have an earning capacity. The judge's decision had merely recited testimony and "rather indefinite" medical opinions, and then reached an unsupported conclusion that the employee could perform adjusted light work.[2] Id. The court stated that, under the circumstances, findings on whether the employee made affirmative efforts to find work "would be" "pertinent." Id. The citation supporting this precatory language is to McCann's Case, 286 Mass. 541, 544 (1934). The medical testimony in McCann allowed that the employee was only disabled as to the particular job in which he had been injured - dermatitis on his hands from excessive

[2] The Appeals Court recognized this and so limited the holding of Ballard in Mulcahey's Case, 26 Mass. App. Ct. 1, 4 (1988):

> Ballard's Case falls within the principles represented by such cases as Messersmith's Case, 340 Mass. 117, 120 (1959), and Camaioni's Case, 7 Mass. App. Ct. 927 (1979), regarding the inadequacy of a mere recitation of testimony in place of proper fact-finding, and such cases as Whitaker's Case, 354 Mass. 4, 5 (1968), and Wajda's Case, 6 Mass. App. Ct. 865 (1978), regarding the defectiveness of an ultimate finding which conflicts with testimony specifically found credible or uncontradicted testimony not discredited by the board.

exposure to soapy solutions - and that he could perform work "other than that requiring him to place his hands in water." Id. at 543. The McCann court specifically noted:

> All this [medical] testimony did not warrant a finding of total disability . . . . It warranted a finding of disability as to the particular employment but not as to employment in general. *It was the duty of the employee to try to get other work*. . . . It appeared that in April and May, 1932, he worked for the city.

Id. at 543-544 (emphasis added). The Ballard court quoted the italicized language above in its parenthetical to its McCann citation. The Ballard court then summarizes: "Without a showing of attempts (unless they would be futile) to secure employment, a claimant cannot support a claim of total disability on the basis that employment is unobtainable." Ballard's Case, supra at 1069.

We consider that the self-insurer's reliance on the proposition just quoted above does not take into account the context of Ballard's Case. See Mulcahey's Case, supra. In the instant case, the judge's medical findings, supported by the impartial physician's report and deposition testimony, are clear and definite:

> The employee's conditions of bilateral carpal tunnel syndrome and right (sic)[3] trigger thumb are causally related to her work in food preparation for the employer. Despite some improvement in her grip strength, the employee's symptoms have not abated since her last examination[4] and her basal joint arthritis is somewhat worse than it was at her previous examination in October of 2000, a progression that has accelerated as a result of her work activities at Boston College

[3] The medical evidence indicates that the trigger thumb was the left, not the right. See also (Dec. 4.)

[4] The doctor had examined the employee two years earlier, and had found persistent bilateral median nerve symptoms: i.e., cold, stiff hands. The doctor at that time found that the employee was totally disabled from work requiring any heavy lifting or repetitive task, but allowed that she could perform non-repetitive work requiring no lifting greater than 5-10 pounds. (Impartial Ex. #2.)

> (See Deposition Transcript, p. 24).[5] Her 13 years in the food service department where she engaged in numerous repetitive and heavy tasks is at least 50% responsible for causing and/or aggravating her carpal tunnel syndrome and basal joint arthritis and accounts for her disability. The employee remains completely disabled from any work requiring lifting more than 20 lbs. and/or any repetitive tasks. She has reached a medical end point unless surgery is performed an option which the employee has presently decided not to pursue.

(Dec. 5; footnotes added.) The judge then conducted a vocational assessment:

> Based on her age of 56, her sixth grade education from her native Greece, her very limited transferable skills, as well as her physical limitations as outlined by Dr. Sampson and her limited communication skills in English, I find that the employee is totally incapable of engaging in any meaningful employment.

(Dec. 6; footnote omitted.) Further related to the employee's vocational profile, the judge found the following:

> "In the process of cross examining the employee, insurer counsel raised the possibility of the employee performing the work of a crossing guard monitor or school monitor. I find that the employee's limited ability to communicate in English would render her unsuitable for these positions which she might otherwise be able to physically perform."

(Dec. 5 n.2) "I find that the slight improvement in the employee's grip strength and lifting ability (See Impartial Examiner Exhibits Nos. 1 and 2) does not significantly impact on her capacity to perform gainful employment especially in light of the other factors herein enumerated." (Dec. 6 n.3.)

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[5] It is important to stress that the self-insurer had paid temporary total incapacity benefits until exhaustion, pursuant to the judge's prior hearing decision of January 31, 2002. (Board Ex.) The judge's conference order of § 35 at the maximum rate was not an adjudication on the merits, and did not necessitate the employee's showing of a "worsening" in order to support her claim for § 34A benefits. Buonnano v. Greico Bros., 17 Mass. Workers' Comp. Rep. 91 (2003). See Foley's Case, 358 Mass. 230 (1970). The employee needed only to show a continuance of her work-related medical impairment that was unlikely to improve in order to make her prima facie showing of permanent and total incapacity. Holmes v. Baybank, 16 Mass. Workers' Comp. Rep. 322, 324 (2002).

The judge cannot be faulted for a Ballard-type error, because to do so in light of the detailed medical and vocational findings quoted above would be to broaden the holding of that opinion beyond recognition. This, Mulcahey's Case admonishes against. See n. 2 supra. While evidence of attempts to secure employment can be pertinent in particular cases, where an employee's medical limitations and transferable skills suggest the appropriateness of that inquiry (see McCann's Case, supra), we decline to implement a prerequisite to receipt of total incapacity benefit that the act does not. See LaFlam's Case, 355 Mass. 409, 411 (1969); Svedberg v. Roy & Gagnon Plumbing & Heating Co., 4 Mass. Workers' Comp. Rep. 160 (1990)(no outright duty of employee to seek work to prevail on claim for permanent and total incapacity benefits). In so concluding, we hereby overrule our decision in White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343 (1999), in which we applied an overly broad interpretation of Ballard's Case. Id. at 346-347.

Finally, the self-insurer argues that the judge failed to apply "the normal wear and tear doctrine" under Zerofski's Case, 385 Mass. 590 (1982), to deny the employee's claim. (Self-insurer's brief, 19.) We disagree as the evidence does not support the application of Zerofski to the instant case. The self-insurer's specific theory is that, since the impartial physician testified that the employee's work merely " *could* have aggravated" her underlying arthritis, and that "activities of daily living not working, *would* result in an actual progression of arthritis," any progression of the arthritis during her incapacity over the past several years necessarily was wear and tear unrelated to her work. (Self-insurer's brief, 7, 22-23)(emphasis added.)

The argument fouls out of the starting blocks. The medical testimony actually was that the work aggravated the employee's arthritis (not just " *could* have aggravated"), and that it was the activities of daily living which merely *could* have caused the progression of the arthritis.[6] Without an accurate factual foundation for the self-insurer's wear and tear argument, we are disinclined to entertain it.

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[6] Q: But you would be of the opinion that her job at Boston College aggravated that [arthritic] condition?

A: That's right.

. . . .

Accordingly, the decision is affirmed. Pursuant to § 13A(6), the self-insurer is ordered to pay employee's counsel a fee of $1,276.27.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: September 27, 2004

> Q: The progression of her arthritis in her basal joint, would that be something that would be a natural progression of that arthritis?
>
> A: It could be. If she was just at home, you know, doing her activities of daily living, not working, you can get progression of basal joint arthritis.

(Dep. 14.)

> Q: Is it your opinion, that it is more likely than not that the progression of this patient's basal joint arthritis was accelerated as a result of her work activities at Boston College?
>
> A: Yes, I would agree with that. . . .

(Dep. 24.)