COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032926-03**

Joao Txicanji	Employee
Stop & Shop	Employer
Ahold USA Inc.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Costigan and Fabricant)

APPEARANCES
Rickie T. Weiner, Esq., for the employee at hearing
Jonathan Harris, Esq., for the employee on appeal
Sean P. Downing, Esq., for the insurer

CARROLL, J. The employee appeals from a decision allowing the insurer's complaint for discontinuance of incapacity benefits. We affirm.

The employee sustained an industrial injury to his non-dominant left wrist while lifting a bag of onions in the employer's warehouse on September 11, 2003. (Dec. 5.) The insurer accepted the claim, but filed a complaint to discontinue payment of workers' compensation benefits after discovering that the employee had started running a dry cleaning business on March 15, 2005. (Dec. 2, 4.)

The impartial physician diagnosed DeQuervain's tendinitis which had resulted from the work-related wrist sprain. He opined that the employee was capable of performing full time modified work duties that would restrict any frequent lifting over thirty-five pounds. (Dec. 6.)

The judge considered the employee's college education, his ability to speak four languages fluently, his ability to drive, his knowledge of electronics and telecommunications, and his ability to run the dry cleaning business, and added those factors to the adopted impartial medical disability opinion. (Dec. 8-9.) The judge concluded the employee had the capacity to earn greater than his pre-injury

average weekly wage, and allowed the complaint to discontinue benefits effective March 15, 2005. (Dec. 9-10.)

The employee argues that the judge disregarded evidence he was required to consider, namely, that he was unsuccessful in attaining a job in electronics, because the interviewers apparently did not look kindly upon his having had a workers' compensation injury. (Employee br., 6.) We agree with the insurer that this one factor in a vocational analysis under Scheffler's Case, 419 Mass. 251, 256 (1994)("attitudes of personnel managers"), does not vitiate the judge's otherwise sound vocational analysis.

Opoka v. Rock Valley Tool, Inc., 14 Mass. Workers' Comp. Rep. 1 (2000), cited by the employee for the proposition that findings on that factor are necessary, is distinguishable. In that case, the employee had undergone vocational rehabilitation to enter the computer field, and had no success in landing a job, even though he submitted nearly three hundred resumes. Id. at 2. The judge nonetheless based Mr. Opoka's earning capacity on that retraining, which was error. Id. at 3. Unlike the present employee, Mr. Opoka did not have great transferable skills for reentering the work force, when his retraining was taken out of the picture. Id. at 2-3. Here, the judge's findings detailed explicitly this employee's diversified skills and work experience as indicative of an earning capacity that exceeded his average weekly wage while working as a selector in the employer's warehouse. (Dec. 3-4, 8-9.) There was no error.[1]

We comment on one other point. "The terms 'incapacity' and 'disability' are words of art in the Massachusetts workers' compensation system." Medley v. E.F. Hauserman Co., 7 Mass. Workers' Comp. Rep. 97, 99 (1993). "[Incapacity] combines the elements of physical injury or harm to the body, the medical

[1] While we do not consider the employee's argument to be meritorious, we likewise do not find it frivolous for the purpose of the insurer's request for § 14 sanctions.

element, and loss of earning capacity traceable to the physical injury, the economic element." Blakely v. Jan Cos. (Burger King), 10 Mass. Workers' Comp. Rep. 219, 220 (1996). "[M]edical disability and work incapacity are distinct concepts married generally through examination of vocational factors[.]" Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 172 (1995).

The judge mistakenly transposed "disabled" for "incapacitated." (Dec. 9, 10.) The judge correctly referred to "disabilities" when speaking of the impartial doctor's medical opinion that the employee was capable of performing full time work, modified to avoid frequent lifting above thirty-five pounds. (Dec. 6, 8.) However, he then concluded the employee was no longer "disabled" from earning his pre-injury wage. (Dec. 10.) Here the judge clearly had in mind the state of the employee's "incapacity:" that he was " 'not entitled to compensation for an industrial injury . . . resulting in a physical disability [as there was] no impairment of earning capacity.' " Medley, supra at 99 (quoting Atkins's Case, 302 Mass. 562, 564 (1939)). Although the decision read as a whole indicates the judge knows the distinction, we remind the bench and bar that the terms should not be used interchangeably. See Loudenslager v. Mass. College of Art, 14 Mass. Workers' Comp. Rep. 322, 323-324 n.1 (2000).

The decision is affirmed.

So ordered.

_____
Martine Carroll
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

Filed: **April 11, 2007**