COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 015826-93**
John C. Opoka	Employee
Rock Valley Tool, Inc.	Employer
Cigna Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
Steven D. Rose, Esq., for the employee
Jennifer A. Hylemon, Esq., for the insurer at hearing
William R. Maher, Esq., for the insurer on brief

MCCARTHY, J. John C. Opoka, now forty-one years of age, is single and a resident of Belchertown, Massachusetts. He dropped out of high school after finishing the eleventh grade and embarked on a series of labor intensive positions including work in a warehouse, landscaping and work as a machinist. (Tr. 9.)

On April 19, 1993, while working for Rock Valley Tool Inc., Mr. Opoka injured his back while lifting a tree in the course of his employment. Back surgery was followed by various forms of therapy (Dec. 2.) This injury imposed physical restrictions upon Mr. Opoka. He could not lift more than twenty pounds nor could he lift from a bent position. He was also required to change positions frequently. Id.

The insurer accepted the claim and paid weekly incapacity benefits for a closed period. Thereafter, the employee filed a claim for further benefits. This claim came on for conference and on March 5, 1997, the judge directed payment of § 35 benefits at the weekly rate of $55.76 based on an agreed average weekly wage of $432.94 and an earning capacity of $340.00 per week. This order was retroactive to October 21, 1996. Mr. Opoka appealed the conference order and the case went back to the same judge for a

full evidentiary hearing. The single issue before the judge at the hearing was extent and duration of incapacity.

Among the pertinent subsidiary findings of fact are these. Following his injury the employee obtained his G.E.D. Thereafter, he enrolled in a one-year program in computer and electronic technology at Porter and Chester Institute. (Dec. 2.) The judge observed that "Mr. Opoka has done an admirable job of retraining himself." (Dec. 2.) Following his graduation in April 1996, the employee conducted a job search which included sending out almost three hundred resumes. He received no job offers in the computer field.

Although there is no finding on the point, the parties agree that he received more than a dozen interviews with computer firms but was not offered work by any of them. (Employee brief 2; Insurer brief 3.) The employee testified that the interviews went very well until he was asked to explain the time gap in his employment. When he responded that he suffered a worker's compensation injury and had some physical restrictions, the interviews "seemed to be shut off at that point." (TR. 15.) The hearing judge made no finding with respect to this testimony.

In February 1997, Mr. Opoka started work at Serv-U stores as a salesman of industrial chemicals. His starting wage was $7.00 an hour for forty hours, or $280.00 per week. (Dec. 2.) In August 1997, he received a forty-cent per hour raise, increasing his wage to $296.00 per week. The hearing judge also found that on February 6, 1998, he received a fifty cent an hour raise which increased his wages to $346.25 per week.[1]

In reaching his conclusion on earning capacity, the hearing judge looked to § 35D for guidance. He noted that the computation of earning capacity here should be based on the greater of the actual earnings each week or the earnings Mr. Opoka was capable of earning. The judge elected to measure the employee's earning capacity in this case by

[1] The employee contends - - and the insurer agrees - - that this finding is an error. The employee testified that his second raise was twenty-five cents an hour not fifty cents. (TR. 17; Employee brief 4; Insurer brief 2).

the earnings the judge felt he was capable of earning rather than his actual earnings. He wrote as follows:

> While the actual earnings of the employee are to be considered, they are not the only consideration in determining an earning capacity. In this case, for instance, while the employee was not making quite the amount he could have been making with his assigned earning capacity, I note he also was not working in the field he was re-trained for. While I recognize that he did an extensive job search and was not able to actually find a job in that field, it appears from his own testimony that there were ample suitable openings, and that he was at least capable of doing those jobs. Assignment of an earning capacity taking into account his significantly more specialized training and skills was appropriate.

(Dec. 3.) On appeal, Opoka argues that the subsidiary findings with respect to earning capacity are inadequate and the award of an earning capacity is arbitrary. We agree.

Although deference must be given to the judge's determination of earning capacity, Mulcahey's Case, 26 Mass. App. Ct. 1 (1988), such determination must not be arbitrary and capricious and must be supported by adequate subsidiary findings grounded in competent evidence. See Deyette v. University of Massachusetts Medical Center, 13 Mass Workers' Comp. Rep. 14, (1999); Lolos v. Monsanto Co., 12 Mass. Workers' Comp. Rep. 83, 84 (1998); Beagle v. Crown Service Systems Inc., 10 Mass Workers' Comp Rep. 282, 284 (1996).

> Incapacity for work is the common statutory basis of benefits for total, permanent and total, and partial disability. The degree of incapacity determines whether the disability is total or partial. 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 earning capacity in 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 strength or weakness of the economy also influence an injured employee's ability to hold a job or obtain a new position. 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 . . . (footnotes omitted). L.

> Locke, Workmen's Compensation § 321, at 375-376 (2d ed. 1981). See also 1C A. Larson, Workmen's Compensation § 57-11, at 10-16 (1994 & Supp. 1994) (discussing disability adjudication in similar manner).

Scheffler's Case, 419 Mass. 251, 256 (1994) (emphasis added).

In the case before us, it is not disputed that the employee interviewed with at least a dozen computer companies. This is the work for which he went to school for one year.[2] One of the elements to be considered in arriving at earning capacity is "the attitudes of personnel managers." Scheffler's Case, Id. Here, Mr. Opoka testified that the managers he spoke with lost interest in him when he reported that he had been out of work as a result of an industrial injury and that injury imposed physical restrictions on him.

If there is evidence that human resource managers are less favorably disposed towards individuals who have collected workers' compensation, that attitude, if found to be true, can be considered by hearing judges in assessing earning capacity. It has also been suggested that "post-injury earnings constitute prima facie evidence of employee's actual earning capacity, and a judge cannot disregard them without explanation." Welch v. A.B.F. Systems, 9 Mass. Workers' Comp. Rep. 407, 411. (1995).

We now return this case to the senior judge for reassignment to the hearing judge, who should make further subsidiary findings consistent with what we have said above. After making further subsidiary findings, should he elect to use the actual earnings of the employee as the measure of his earning capacity, he must correct his finding of a fifty-cent an hour increase on February 6, 1998 and reduce it to twenty-five cents per hour.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: February 8, 2000

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Sara Holmes Wilson
Administrative Law Judge

[2] Travelers Insurance Company contributed five thousand dollars and the employee borrowed an additional five thousand dollars to pay for this schooling. As the judge noted in his decision, the employee did an admirable job retraining himself.

Suzanne E.K. Smith
Administrative Law Judge