COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 055957-99**

Jose Silva	Employee
J. Masterson Construction Co.	Employer
Ohio Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Wilson and Costigan)

APPEARANCES
Daniel P. Napolitano, Esq., for the employee
James W. Stone, Esq., for the insurer

LEVINE, J. The insurer appeals from a decision in which an administrative judge awarded the employee permanent and total incapacity benefits for an accepted industrial injury that occurred in 1999, when he broke his left leg and ankle. The insurer challenges the judge's award of benefits that were partly based on the current weak economy. We affirm the decision.

The judge's general findings lay out a sufficient background for the discussion of the question presented on appeal:

> I find that the employee is permanently and totally disabled pursuant to section 34A and the relevant case law. In making this determination, I rely on the credible testimony of the employee, the vocational opinions of the two vocational experts and the medical opinions of Dr. Denis P.A. Byrne. All three of the experts (Byrne, Freiberg-Dale and Palange) conceded that given the right set of circumstances, the employee could find work, despite his lack of English speaking skills, his third grade education, his advanced age (58), and his concededly substantial physical impairments. Despite these findings, I find *at this time, in this economy,* with the prospect of another substantial ankle surgery, and considering the employee's lack of education and transferable skills, and his credible complaints of pain, that he has no nontrifling earning capacity at this time. I am hopeful that the employee will return to the workforce at some point, but the credible evidence convinces me that such a return will not occur in the foreseeable future.

(Dec. 362-363, emphasis added.) The vocational experts relied upon by the judge included in their opinions that the weak economy decreased the employee's job prospects. Barney Freiberg-Dale, for the insurer, "found that the employee's job prospects were meager due to the weak economy . . . . He conceded that in this economy it could be 'extremely difficult' to find a job." (Dec. 362.) Linda Palange, for the employee, found him to be unemployable, but stated that "in a robust economy the employee would have difficulty finding work although he could probably find something." (Dec. 362.)

The insurer contends that the judge's use of the current state of the economy to support his finding of permanent and total incapacity was contrary to law, because economic conditions are temporary and transitional by their very nature. The insurer acknowledges that "permanent" does not mean eternal, but instead means that it will continue indefinitely, albeit with a possibility of improving. Yoffa v. Metropolitan Life Ins. Co., 304 Mass. 110, 111 (1939); Sylvester v. Town of Brookline, 12 Mass. Workers' Comp. Rep. 227, 231 (1998). The insurer states that "it is well known and understood that the current economic downturn will end after several years. This is far from an indefinite period of time required for a finding of permanency." (Insurer's brief, 6.) We disagree. There is no evidence that the weak economy, as described in the evidence, (see Dec. 362), is coming to an end. Furthermore, there is no evidence in the record to support the insurer's assertion of common knowledge regarding "economic cycles." Even if such evidence were not necessary, the insurer would have had to request that the judge take judicial notice of this allegedly indisputable fact. See P. J. Liacos, Massachusetts Evidence § 2.8.2 (7th ed. 1999)(appropriate to take judicial notice of "broad and indefinite group of indisputable and either generally known or easily ascertainable facts"). However, not only did the insurer not do so, it is

questionable whether the assertion is a subject for judicial notice. Id., collecting cases. Therefore, there is no merit to the insurer's appeal.[1]

The decision is affirmed. Pursuant to § 13A(6), the employee's attorney is awarded a fee of $1,273.54.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Filed: September 22, 2003

[1] The insurer does not argue that it was error to rely at all on the state of the economy as a factor in determining earning capacity. It contends that the error the judge made was to rely on it as a factor in determining permanency. We therefore need not consider the fundamental question regarding the role the state of the economy can play in incapacity analysis. Cf. Phillips v. Youth Dev. Program, Inc., 330 Mass 652, 657-660 (1983)(suggesting that the Supreme Judicial Court will not consider nonjurisdictional issue not raised before the Appeals Court). On that fundamental question, the law is that "[c]ompensation cannot be awarded for lack of employment due to depressed business or want of demand for labor; diminished earning capacity resulting from the injury must be shown." Manley's Case, 282 Mass. 38, 39 (1933). See also Akins's Case, 302 Mass. 562, 564-565 (1939); Strycharz's Case, 291 Mass. 212, 216 (1935); Johnson's Case, 242 Mass. 489, 492-493 (1922). Scheffler's Case, 419 Mass. 251, 256 (1994), need not be read differently.

Furthermore, the judge's unchallenged findings -- that the 58 year old employee lacks English speaking skills, has only a third grade education, (Dec. 363), has worked only as an unskilled laborer in this country, (Dec. 360), lacks transferable skills, (Dec. 363), has credited complaints of ankle pain, which increases with use, (Dec. 361, 363), and has substantial physical impairments, (Dec. 363) -- are sufficient to support the judge's § 34A finding.