COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017542-96**

Karen Caldwell	Employee
Fleet Financial Group, Inc.	Employer
Fleet Financial Group, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, Carroll and Maze-Rothstein)

APPEARANCES
Richard C. Hyman, Esq., for the employee
Peter P. Harney, Esq., for the self-insurer at hearing
Robert J. Riccio, Esq., for the self-insurer on appeal

WILSON, J. The employee appeals from a decision in which an administrative judge awarded her ongoing partial incapacity benefits, based on the stipulated $503.62 average weekly wage and the judge's finding of an earning capacity of $400.00 per week. The employee contends that the judge erred by adopting the opinion of the self-insurer's vocational expert witness, because that opinion was grounded in hearsay information and did not account for the employee's current residence outside the Commonwealth. We find no error and affirm the decision.

The forty-three year old employee worked for banks throughout her career. She developed repetitive injuries to both of her hands and wrists while working during 1996 as a teller and coordinating supervisor for the employer. (Dec. 4.) She was forced to cut back her hours, and eventually stopped working due to the pain. She resigned from her position as of July 8, 1997, and moved to Arizona in October 1998. After collecting unemployment benefits, she sought workers' compensation benefits. (Dec. 4-6.)

The employee claimed § 35 benefits for partial incapacity from April 24, 1998, along with § 30 medical benefits. The self-insurer accepted liability for the February 1, 1996 industrial accident, but contested the extent of incapacity and causal relationship. (Dec. 2.) In defense of the claim, the self-insurer introduced the expert opinion of a

vocational consultant, Barney Freiberg-Dale. He testified that he had conducted labor market surveys, which indicated that there were jobs available that were within the medical limitations the impartial physician placed on the employee; namely, that she could return to work involving less rapid, repetitive activity. The jobs Mr. Freibreg-Dale identified in the employee's former geographic area were those of bill or debt collector, hotel clerk or telemarketer. (Dec. 8-9; July 6, 1999 Tr. 13, 19.) The judge adopted the expert's testimony that the employee could perform any of these jobs. (Dec. 9.) Consistent with that opinion, the judge ordered § 35 benefits reflecting an earning capacity of $400.00 per week. (Dec. 10.)

As she did at hearing, the employee on appeal challenges the foundation for the vocational expert's opinion.[1] The employee contends that the opinion impermissibly relied on hearsay telephone conversations with various potential employers, and should not have been admitted. We disagree.

There is no question that the vocational expert conducted his labor market surveys in the employee's former geographic area largely by telephoning potential employers and inquiring as to openings. (July 6, 1999 Tr. 13-16.) The hearsay rule would certainly bar the admission of the extra-judicial telephone conversations' content, had such been offered merely to prove the truth of the matters asserted therein. Liacos, Handbook of Massachusetts Evidence, § 8.1 (6th ed. 1994). However, insofar as they were used as source material for the vocational expert's opinion, the telephone conversations pose no hearsay problem. In Department of Youth Services v. A Juvenile, 398 Mass. 516, 531 (1986), the Supreme Judicial Court held for the first time:

> [An expert may] base an opinion on facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion. Such a change will eliminate the necessity of

[1] We note – without deciding the merits thereof – the self-insurer's argument that the employee's foundational objection was not timely and therefore waived, as it came after the self-insurer had already examined the expert as to his sources for his opinion. (July 6, 1999 Tr. 27-28.) The issue is rendered moot by our disposition on the merits of the objection.

> producing exhibits and witnesses whose sole function is to construct a proper foundation for the expert's opinion.

In so holding, the court rejected the proposed Massachusetts Rule of Evidence 703, which allowed an expert to base his opinion on inadmissible evidence. The telephone conversations with the employers fall comfortably within the "independently admissible" rubric of A Juvenile, supra. "The direct testimony of these parties [the potential employers], had it been offered, would have been independently admissible." Anthony's Pier Four, Inc., v. HBC Associates, 411 Mass. 451, 480 (1991). The judge did not err in allowing the vocational expert to testify as to his opinion on job opportunities for the employee, based on his telephone conversations with potential employers.

The employee also argues that the judge erred by allowing the vocational expert to testify as to the jobs available in the geographic area of her former residence in Everett, Massachusetts, rather than Mesa, Arizona, where she currently lives. On the facts of this case, we do not consider that the difference in locale is fatal to the opinion of the vocational expert. General Laws c. 152, § 35D, governing the assessment of earning capacity, does not limit the location of any "particular suitable job" that the judge might consider in determining the employee's earning capacity. See § 35D(3) and (5).[2] "The Legislature has not defined the term 'suitable job' in a manner so broad as to include consideration of the location of an employee's home vis-à-vis that of the job." Major v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 90, 93 (1993). In Major, supra, the

[2] Subsection 35D(3) sets out one of the four possible methods of establishing earning capacity under that section, and provides that the judge may use as a basis: "The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it." Although the facts of this case do not include a job offer, the definition in subsection 35D(5) provides guidance to the parameters of "a suitable job or employment." It states:

> For the purposes of this chapter, a suitable job or employment shall be any job that the employee is physically and mentally capable of performing, including light work, considering the nature and severity of the employee's injury, so long as such job bears a reasonable relationship to the employee's work experience, education, or training, either before or after the employee's injury.

reviewing board considered that a § 35D(3) "particular suitable job" "ha[d] been made available," pursuant to the statute, even though the employee no longer lived anywhere near the employer, which offered the job. Id. We think that the vocational expert's testimony regarding actual job openings also satisfies the element of "availability."[3] Although the vocational expert's opinion may well have had more probative value had he assessed the availability of suitable jobs for the employee in Mesa, Arizona, the lack of such information goes only to the weight to be accorded the opinion, not its admissibility. That the judge still found the expert's testimony persuasive was fully within his fact-finding authority with regard to matters of earning capacity, especially where the jobs surveyed could be viewed by the judge as commonplace and thus likely to be found in Arizona, and the assigned earning capacity falls in the lower range of wages. See Mulcahey's Case, 26 Mass. App. Ct. 1, 3, (1988).

The decision is affirmed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **May 9, 2001**

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Susan Maze Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

[3] Alternatively, the more general subsection 35D(4) would apply, in any event: "The earnings that the employee is capable of earning."