

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 051160-02

Leon Shiner
Copy Cop, Inc.
Granite State Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Costigan)

APPEARANCES
Francis J. Hurley, Esq., for the employee
William C. Harpin, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision in which the employee was awarded continuing §34 benefits for a work injury to his left upper extremity, shoulder and neck. Because we agree with the insurer that the judge's assessment of the employee's earning capacity was not supported by sufficient findings of fact, we recommit the case for further findings.

The employee worked as a printer for the employer, a job requiring constant use of both arms and shoulders, and repetitive lifting of cartons of stock and materials weighing up to 50 pounds. On July 31, 2002, while unloading cases of stock, the employee was injured, resulting in continuous pain and numbness in his left hand, arm, shoulder and neck. (Dec. 3-4.)

Although the employee continued to work, he found that he could not perform heavy tasks due to his pain and numbness. His treating physician provided him a note requesting light duty, and the employer accommodated his restrictions for several months. However, the employee was ultimately terminated on February 28, 2003 because he could not perform his regular job. (Dec. 4.)

Following his termination, the employee collected unemployment benefits until December 7, 2003. (Tr. 56). His workers' compensation claim sought benefits subsequent to the exhaustion of the unemployment benefits. (Ex. 2; Tr. 58.)

The impartial physician diagnosed left carpal tunnel syndrome evidencing compromise of the median nerve, cervical disc protrusions at C5-6 and C6-7, left cubital tunnel syndrome, left trapezius strain, and an interior glenoid labrum tear of the left shoulder, all causally related to the work injury. The doctor opined that the employee could not return to his prior work, but could perhaps perform sedentary work if he first had surgery for the carpal and cubital tunnel syndromes, as well as possible surgery for the left shoulder tear. (Dec. 6-7.)

The judge allowed additional medical evidence due to the medical complexity of the issue of the prospective surgeries. (Dec. 2.) The additional medical evidence supported the necessity for surgery due to the work-related diagnoses noted by the impartial physician, as well as the sedentary work capacity also found by the impartial physician. (Dec. 5-6, 7-8.)

The judge found that the employee had suffered an industrial injury, and that he was terminated on February 28, 2003 when the employer was no longer willing to accommodate his medical restrictions. The judge further concluded that the employee was partially disabled from all but the modified work furnished by the employer from the date of injury, July 31, 2002, until he was terminated from employment. The judge adopted various medical opinions that the employee was restricted from repetitive use of his left arm and hand, and lifting over 10 pounds, and he credited the employee's complaints of pain and numbness in his left upper extremity, shoulder and neck. (Dec. 8-9.) Given the need for surgery, as suggested by the medical opinions in evidence, and the employee's limited vocational experience as a printer and a painter, (Dec. 3), the judge concluded that the employee was incapacitated for all work in the open labor market. (Dec. 9.)

We agree with the insurer that the judge's findings on the employee's total incapacity to work are difficult to reconcile with the fact that the employee was, in fact, working in a light duty capacity when he was terminated from his employment.¹ Nothing

¹ The employee applied for, and received, unemployment benefits following his termination. The employee indicated on his application for unemployment benefits that he was "ready,

in the decision indicates that the employee's medical condition or the labor market in general had worsened. See Buonanno v. Greico Bros., 17 Mass. Workers' Comp. Rep. 91, 94-95 (2003). Indeed, the judge found that the employee had the ability to perform the light duty binding work that he was doing immediately prior to his termination. (Dec. 8-9.) However, the judge concluded that this job was a uniquely suitable position only the employer could offer, and he did not indicate that the employee had an earning capacity on the open labor market. This conclusion is not supported by sufficient findings of fact. The decision reflects that the light duty job differed from the employee's pre-injury job only by the absence of lifting. No findings describe how this job is so unique as to be excluded from any transferable skill assessment, and therefore, additional findings are needed as to why the employee's ability to perform his former light job duties cannot support an earning capacity in the open labor market. Cf. Bradley's Case, 56 Mass. App. Ct. 359, 364-365 (2002)(artificially inflated wage of \$23 per hour for light duty post-injury job answering phones and filing, provided by union contract, was unreliable basis for determining earning capacity).

Recommittal is therefore appropriate for further findings of fact addressing the employee's present incapacity status in light of these considerations. See Crowley v. Salem Hospital, 8 Mass. Workers' Comp. Rep. 374 (1994).

We therefore recommit the case for further findings. We affirm the decision as to the insurer's other arguments on appeal.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

willing, and able to go back to work." (Tr. 56). "Receipt of unemployment compensation benefits is consistent with partial incapacity. G. L. c. 152, § 36B(2)." Cronin v. Consolidated Fabricators, 19 Mass. Workers' Comp. Rep. 216, 219 (2005).

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William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

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