COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 001079-94**
Peter Pierce	Employee
Matuszko Trailer Repair, Inc.	Employer
Travelers Property Casualty	Insurer

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

APPEARANCES
Alan S. Pierce, Esq., for the employee
Gail E. Quinn, Esq., for the insurer

CARROLL, J. The insurer appeals a § 11 hearing decision in which the employee was awarded weekly § 34A benefits, continuing medical expenses under § 30, attorney fees and reasonable expenses. The insurer contends that the judge's finding that the employee is permanently and totally incapacitated is arbitrary and not supported by the evidence. We disagree and therefore affirm the decision.

At the time of the hearing, Peter Pierce was fifty-five years old and married with three adult children. Mr. Pierce was born and raised in Jamaica where he received a high school education, which is less than the equivalent of a high school education in the United States. (Dec. 273.) Upon coming to the United States, the employee completed a one-year trade school program at the Brooklyn, New York, YMCA. He began working as a truck driver, driving eighteen-wheelers and did this type of work for twenty-five years. Id. For a time in the 1980s he owned a trucking business and was the sole driver, operating an eighteen-wheeler exclusively for one customer. Id.

On January 24, 1994, Pierce was struck by a car while checking his truck lights by the side of the road. Id. He was thrown onto the hood of the car and then rolled off,

landing in the road. He felt pain everywhere. Id. Pierce was working for Matuszko Trailer Repair, Inc. at the time and Travelers, the workers' compensation insurer, accepted liability for the injury. (See Stipulations Dec. 271.) The employee has not returned to work since. (Dec. 273.) In the months that followed, many of Mr. Pierce's maladies resolved. However, his right arm and shoulder pain persisted. Several diagnostic tests were performed. In February 1995, the employee underwent surgery involving a fusion of his cervical spine from C4 to C6, diskectomies at multiple levels, the excision of the C5 disc, and a bone graft. Id.

As the maximum entitlement under § 34 approached, the employee filed a claim for permanent and total weekly benefits under § 34A. On March 6, 1997, pursuant to § 10A, the employee's claim for § 34A benefits was conferenced before an administrative judge. (Dec. 272.) A conference order was filed directing payment of weekly § 35 partial incapacity benefits. The employee appealed to a hearing de novo. Id.

On May 9, 1997, pursuant to §11A, the employee was examined by Dr. John C. Molloy. Id. The medical report of the impartial physician was admitted into evidence. (Ex. 3.) Neither party chose to depose Dr. Molloy. Dr. Molloy diagnosed the employee's physical status as post diskectomies at multiple levels with excision at C5 and fusion from C4 to C6, with residual significant limitation of his range of motion of the neck and continuing radicular symptoms. (Ex. 3, 2-3; Dec. 274.) He also opined that the employee was permanently and totally disabled from all employment as a result of his January 24, 1994 work injury. (Id; Ex. 3, 3.) Neither party challenged the medical report. The administrative judge ruled that the § 11A report was "fully adequate" within the meaning of the statute and adopted the impartial examiner's medical opinions as found in his report. (Dec. 276.)

On appeal, the insurer argues that the reviewing board should instruct the administrative judge who heard this case to issue a (new) decision either affirming the conference order or increasing the earning capacity assigned at conference. (Insurer's brief, 4.) Basically, the insurer argues that the vocational expert and impartial examiner

were not fully aware of certain aspects of the employee's work history when they rendered their opinions and/or that by virtue of the employee having some experience beyond the actual physical work of driving a truck[1] and/or because the employee showed some interest in retraining[2] that the judge was compelled to find an earning capacity. The insurer argues that the evidence, when combined with the fact that the employee has had no active treatment (as of the hearing date) for over a year, (Tr. 35), requires a finding of an earning capacity. (Insurer's brief, 2-3.)

Our review is limited to determining whether the administrative judge's decision is beyond the scope of his authority, arbitrary, capricious, contrary to law or in need of recommital for further findings. G.L. c. 152, § 11C. Extent of incapacity to work is usually a question of fact. DiRusso v. M.B.T.A., 11 Mass. Workers' Comp. Rep. 217, 219 (1997); Fowler v. N.E. Cartage Corp., 9 Mass. Workers' Comp. Rep. 463, 467 (1995); Barry's Case, 235 Mass. 408, 410 (1920). Vocational expert opinion is evidence for judges to weigh in assessing how § 11A based medical disability impacts on the earning capacity of different individuals. Simoes v. Town of Braintree School Dept., 10 Mass. Workers' Comp. Rep. 772, 777 (1996), citing Scheffler's Case, 419 Mass. 251, 256 (1994). Moreover, we point out that the judge has considerable discretion in determining the amount of an employee's earning capacity, if any. See DiRusso supra at 220; Fowler supra at 467. The judge's deter-mination is sustainable as long as it is supported by adequate subsidiary findings that are grounded in the evidence. See Beagle v. Crown Serv. Sys., Inc., 10 Mass. Work-ers' Comp. Rep. 282

[1] The insurer specifically argues that the employee (a) had, in the past, worked as a manager for a parking garage, (Tr. 8); (b) had owned his own tractor-trailer rig which he leased to trucking companies; leased his own services as the operator; and negotiated each of the leases on his own, (Tr.25-26); (c) completed financial aid documentation and application processes for his daughter, who was then in college, (Tr. 31); (d) earned a Commercial Driver's License, (Tr. 31); and (e) passed the Citizenship Test. (Tr. 32.) See also Insurer's br. 2)

[2] The employee testified that if the [vocational] counselor could identify new options for employment he would be willing to be retrained for a new job. (Tr. 36.)

(1996). Here, the judge made clear and specific findings of fact, that were grounded in the evidence.

The judge adopted the § 11A medical opinion. (Dec. 276.) He found the employee to be a credible witness. Id. Witness credibility issues rest with the administrative judge and such determinations are final. Lettich's Case, 403 Mass. 389, 394 (1988). Here, the employee testified at length regarding his pain. (Tr. 13, 15, 21, 33, 34, 38.) Mr. Pierce testified, and the judge found, that he was frequently incapable of combing his hair and that his wife ties his shoes; that he has trouble sleeping, getting only about three hours of sleep per night; that he experiences pain in his right arm from his biceps to his hand; that his thumb aches; that he experiences stiffness in his neck running down into his right shoulder; that his pain is always present to some degree and has gotten worse in the last year; that the pain is "excruciating" when it flares up; that he does not have much grip strength in his right major hand; that he turns his head with difficulty; and that he has trouble concentrating. (Dec. 274.) The judge was free to consider the effect of the employee's pain on work capacity. Anderson v. Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65 (1990). Contrary to the insurer's assertion that the employee was willing to return to work, Mr. Pierce actually testified, "sure," in response to a question about his interest and willingness to enter a retraining program and as to whether he would "give it a shot[.]"[3] (Tr.36.) However, as of the hearing date, the employee had not received everything he needed from the vocational counselor to have the evaluation completed. (Tr. 36.) Vocational counselor Carol Falcone recorded that the employee was "very interested" in receiving training that would allow him to return to some form of employment, but that until the employee's medical condition improves, he cannot find

[3] Expression of interest in undergoing vocational rehabilitation is not necessarily evidence of present ability to work. Cf. Atherton v. Steinerfilm, Inc., 11 Mass. Workers' Comp. Rep. 114 (1997) (The possibility that the employee's future vocational capacity could improve does not bar a finding of permanent and total incapacity) See also G.L. c.152, § 35D(5).

sustainable work in the open labor market. (Ex. 4, 5-6; Dec. 275.) The testimony of the employee and Ms. Falcone, which the judge credited, does not indicate a present work capacity. Moreover, the background information, which the insurer argues was unknown to Ms. Falcone when she wrote her report, was made known to her during her deposition and there is no evidence that the further details of the employee's work history altered her ultimate vocational conclusion. (Dep. 19-21, 26.) The vocational expert opinion was competent evidence for the judge to consider in his assessment of the employee's loss of earning capacity. Crosby v. Raytheon, 11 Mass. Workers' Comp. Rep. 297, 298 (1997).

There is ample evidentiary support for the subsidiary findings and conclusions reached in the judge's decision.

The administrative judge adopted the § 11A medical opinion, finding the employee incapable of returning to his prior occupation, and found the employee's testimony to be credible. (Dec. 276.) Additionally, the judge adopted the vocational testimony of Carol Falcone, a licensed rehabilitation counselor, that suitable employment options cannot be identified, and that until the employee's medical condition improves the employee cannot find suitable work in the open labor market. (Ex. 4; Dec. 276.) "There [is] nothing contrary to law in allowing the 'other evidence' [the vocational opinions and the employee's complaints of pain] to supplement the prima facie status of the medical conclusions concerning the employee's condition; it simply provide[s] more for the judge to use in conducting a Scheffler analysis to determine what effect the work injury had on this employee's chances of gainful employment." Simoes supra, at 777-778. Accordingly, we affirm.

The insurer shall pay employee's counsel a fee of $1,193.20 pursuant to § 13A(6).

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: