COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 043302-96**

Richard Ellison	Employee
NPS Energy Services	Employer
Insurance Company State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Carroll and Costigan)

APPEARANCES
David J. McMorris, Esq., for the employee
John J. Canniff, III, Esq., for the insurer

HORAN, J. The employee appeals from a denial of his claim for § 34A permanent and total incapacity benefits. We agree the case must be recommitted for further findings, as the decision is bereft of the analysis required by Frennier's Case, 318 Mass. 635 (1945) and Scheffler's Case, 419 Mass. 251 (1994).

The employee, seventy-six years old at the time of hearing, worked as a millwright[1] for over thirty-five years prior to his industrial accident. After exhausting his § 34 and § 35 incapacity benefits, he claimed § 34A benefits for a work-related hernia. The impartial physician concluded, and the judge found, that the employee's industrial injury and resulting disability precluded his return to work as a millwright. The impartial physician also opined the employee was capable of sedentary to light duty work.[2] (Dec. 2-3.)

Despite his assertion to the contrary, the judge's rationale for denying the employee's claim rested chiefly upon the employee's failure to look for work. [3]

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[1] There appears to be no dispute that millwright work is physically demanding.

[2] The impartial physician identified work restrictions of no heavy lifting, bending or stooping frequently, crawling, pushing or pulling. (Dec. 3; Dep. 20, 22.)

[3] The employee had not sought work since receiving § 35 partial incapacity benefits pursuant to a § 19 agreement. When the employee was asked by insurer's counsel about

Most pertinently, the judge stated: "I note that Mr. Ellison agreed to a work capacity for the last four years he collected [§ 35] benefits, and did not search for work *even then*."[4] (Dec. 3; emphasis added.) Although the judge characterized the employee's failure to seek work as "not determinative," as the *only* non-medical factor cited by the judge in his findings, it patently was.

The upshot of the judge's reasoning was that because the employee failed to seek work,[5] he could not prevail in his § 34A claim because the impartial physician did not opine the employee was incapable of performing remunerative work. However, the employee "is not required to produce medical testimony to the effect that [he] is unable to perform any remunerative work." LaFlam's Case, 355 Mass. 409, 411 (1969). Nor does our workers' compensation act require an injured worker to search for work in order to prevail on a § 34A claim. We do not

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the circumstances surrounding the execution of this agreement, the employee testified: "David (apparently referring to employee's counsel) called me on the phone, and your insurance company was sending me to doctors left and right. And the deal was, they wouldn't bother me, if I would accept the reduced rate and go onto partial, but I wasn't partially disabled, I was still totally disabled." Tr. 27; see Berke Moore v. Lumbermen's Mut. Cas. Co., 345 Mass. 66, 70-71 (1962)(tactical determination of whether to settle a claim rather than litigate is informed by numerous considerations such as "the likelihood of success or failure, the cost, uncertainty, delay, and inconvenience of trial as compared with the advantages of settlement").

[4] We note that oftentimes, agreements to receive § 35 benefits are made for practical reasons, such as when an increase to a higher rate under § 34 or § 34A would cause a dollar for dollar offset (reduction) in an employee's social security disability benefit. Such agreements benefit each party; both sides avoid the costs and uncertainty of litigation. The insurer gains the advantage of paying weekly compensation, at least for a time, at a lower rate; the employee's net income is maintained.

[5] We note the judge's reasoning also flies in the face of our stated view that employees are not required to prove a "worsening" to qualify for § 34A benefits following receipt of § 35 benefits under a § 19 agreement. See Dullea v. General Electric Co., 19 Mass. Workers' Comp. Rep. 91, 93 (2005); Listaite v. Worcester Telegram & Gazette, 17 Mass. Workers' Comp. Rep. 485, 488 (2003).

read Ballard's Case, 13 Mass. App. Ct. 1068 (1982), to require such an effort.[6] The Ballard court held that:

> [w]ithout a showing of attempts (unless they would be futile) to secure employment, a claimant cannot support a claim of total disability *on the basis that employment is unobtainable.*[7] Compare LaFlam's Case, 355 Mass. 409, 411 (1969)(claimant "has been unable to obtain employment that requires no physical exertion").

Id. at 1069. (Emphasis added.) In other words, if an employee claims entitlement to total disability benefits on the basis that no one will hire him because of his work-related diminished physical capacity, he cannot prevail absent a good faith attempt to find work. Ballard has not been utilized by our appellate courts to impose upon injured workers a general obligation to seek work as a prerequisite for §§ 34 or 34A eligibility. In remanding the case for further findings of fact on the issue of the employee's earning capacity, the Ballard court noted, "[a]lso,

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[6] We note that Ballard cited McCann's Case, decided in 1934, for the proposition that "[i]t was the duty of the employee to try to get other work." 286 Mass. 541, 544 (1934). While McCann has been cited on occasion by the Supreme Judicial Court, and the Appeals Court, on other points of law, no other appellate decision (including our own), has relied upon it to impose a general affirmative duty upon an injured worker to seek work when that injured worker is claiming total, or permanent and total, incapacity benefits. In fact, we have held to the contrary. Giannakopolous v. Boston College, 18 Mass. Workers' Comp. Rep. 241 (2004)(reviewing board declined to require employees to seek work as a prerequisite for receipt of total incapacity benefits, specifically overruling White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343 [1999]); *aff'd*., Mass. App. Ct., No. 2004 – J – 516, slip. op. (September 20, 2005) (single justice); Stone v. Belchertown State School, 13 Mass. Workers' Comp. Rep. 242, 246 (1999)("evidence of a search for work is not necessary in every claim for §§ 34 or 34A benefits . . . ."); Svedberg v. Roy & Gagnon, 4 Mass. Workers' Comp. Rep. 160, 161 (1990)("There is no outright duty as part of the employee's burden of proving permanent and total incapacity, to show that he unsuccessfully sought work"); see Lagasse v. Dennison National, 8 Mass. Workers' Comp. Rep. 291, 293 (1994)(error to deny § 34A claim on bases that employee failed to seek work and was collecting social security and pension benefits).

[7] Mr. Ellison made no such claim. In fact, at hearing he testified: "I consider myself disabled, totally disabled and, I guess, permanently" and "If I didn't have the hernia, I would be able to work, even with my (other health concerns)." (Tr. 22, 25.)

pertinent here would be findings as to the extent of the employee's *affirmative efforts, if any,* to obtain . . . employment." Id. (Emphasis added.) The court cited comparisons to McCann's Case, supra, and Demetre's Case, 322 Mass. 95, 100-101 (1947). However, we note the employees in those cases had in fact sought work post injury. While we believe the law does not require an injured worker to seek work, what is clear is that a judge may make findings relative to a worker's affirmative effort to do so.[8]

We acknowledge the Ballard court cited McCann as holding that "[i]t was the duty of the employee to try to get other work." 286 Mass. 541, 544 (1934) quoted at 13 Mass. App. Ct. at 1069. However, six years later, the Appeals Court revisited Ballard and, by reference, McCann, in Mulcahey's Case, 26 Mass. App. Ct. 1 (1988). In Mulcahey, the employee appealed an award of partial incapacity benefits following the assignment of a $100 earning capacity. The court noted the employee's physician disabled him only from his former work, and that the employee "conceded that he had not sought lines of work less demanding than his earlier occupation." Id. at 2. Comparing the matter to McCann, and contrasting it with Frennier, the court continued: "[o]n this . . . evidence the single member and, after him, the reviewing board were not *obligated* to find the employee totally rather than partially disabled." Id. (Emphasis added). We interpret this to mean that Mr. Mulcahey *could* have qualified for total disability, even though he had not conducted a job search. See Frennier, supra. The Mulcahey court understood that, as a practical matter:

> The absence of evidence with respect to specific job search alternatives is not unusual. Neither the insurer, trying to prove that the employee is able to return to his usual line of work, nor the employee, trying to prove his total incapacity, is likely to proffer evidence that, if persuasive, would tend to compromise its or his position.

[8] Certainly, a judge may also evaluate the suitability of bona fide job offers when considering the nature and extent, if any, of the employee's earning capacity post injury. General Laws c. 152, § 35D (2-3, 5).

Mulcahey, supra at 3. The court then went on to distinguish Ballard:

> Ballard's Case was in fact an instance of inadequate findings of fact by the board . . . . [and] . . . falls within the principles represented by such cases as Messersmith's Case, 340 Mass. 117, 120 (1959), and Camaioni's Case, 7 Mass. App. Ct. 927 (1979), regarding the inadequacy of a mere recitation of testimony in place of proper fact-finding, and such cases as Whitaker's Case, 354 Mass. 4, 5 (1968), and Wajda's Case, 6 Mass. App. Ct. 865 (1978), regarding the defectiveness of an ultimate finding which conflicts with testimony found credible or uncontradicted testimony not discredited by the board.

Id. at 4. Thus, the Mulcahey court did not read Ballard as requiring a job search prior to establishing §§ 34 or 34A eligibility.

Finally, we reject the insurer's argument that the administrative judge's bald finding that a job search would not be futile in Mr. Ellison's case is a sufficient reason, without more, to support the denial of the employee's claim. (Dec. 3.) A factual finding of "futility" must be the product of an appropriate individualized assessment of the employee's post injury earning capacity[9] under the principles enunciated in Frennier and Scheffler, in consort with § 35D.[10]

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[9] We believe that the existence of an earning capacity precludes a finding of futility. These concepts are mutually exclusive.

[10] General Laws c. 152, § 35D provides:

> For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:—
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> (1) The actual earnings of the employee during each week.
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> (2) The earnings that the employee is capable of earning in the job the employee held at the time of injury, provided, however, that such job has been made available to the employee and he is capable of performing it. The employee's receipt of a written offer of his former job from the employer, together with a written report from the treating physician that the employee is capable of performing such job shall be prima facie evidence of an earnings capability under this clause.
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> (3) 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

Accordingly, we recommit the case for further findings consistent with this opinion.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: November 9, 2006

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is capable of performing it. The employee's receipt of a written report that a specific suitable job is available to him together with a written report from the treating physician that the employee is capable of performing such job shall be prima facie evidence of an earnings capability under this clause.

(4) The earnings that the employee is capable of earning.

(5) Implementation of this section is subject to the procedures contained in section eight. For 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. The fact that an employee has enrolled or is participating in a vocational rehabilitation program paid for by the insurer or the department shall not be used to support the contention that the employee's compensation rate should be decreased in any proceeding under this chapter.