COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 027047-92**
Rose Stone	Employee
Belchertown State School	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES
Gerald L. Pellegrini, Esq., for the employee
Terence H. Buckley, Esq., for the self-insurer

SMITH, J. The employee appeals a decision denying her claim for § 34A permanent and total incapacity benefits and awarding her § 35 temporary partial incapacity benefits. Because the decision is based upon a factual finding that has no support in the record, we agree with the employee that it is arbitrary and capricious. We reverse the finding that the employee admitted that she had not looked for work, (Dec. 19), and recommit the case for further findings of fact on the extent of her incapacity.

Stone, who was forty-three years old at the time of the hearing, had held a variety of positions for the employer, including secretary, telephone operator, and direct service provider. Prior jobs for other employers included positions as a clerk and bookkeeper, machine operator, and domestic engineer. At the time of her most recent injury, she was managing the employer's copy center. (Dec. 4-6.) She first injured her left knee in 1988 when she hit the corner of a typewriter stand. She was out of work for several months and collected workers' compensation benefits. She returned to her job as a telephone operator wearing a cast. (Dec. 6.) Her knee went out again in 1990 while she was working as a secretary for the employer, and she returned to work wearing a knee immobilizer. Again, she received weekly partial incapacity benefits from the self-insurer. (Dec. 7.)

On July 2, 1992, while she was working on a duplicating machine, Stone twisted her left knee, causing it to pop out. She saw Dr. Sklar that day, who noted swelling on her knee. Because her knee kept going out, was weak, and she could not put pressure on it, she underwent surgery on September 3, 1992. She had some physical therapy, but continued to experience significant pain. On August 19, 1994, she underwent a second surgery to remove scar tissue and put her kneecap back into position. (Dec. 7.) After the surgery, she continued to experience the same level of pain as before, though she had some improvement in range of motion. She has not worked since July 2, 1992. (Dec. 7-8.)

The self-insurer accepted liability for the 1992 injury, paying § 34 temporary total incapacity benefits from July 2, 1992 to June 28, 1995. (Dec. 2.) Stone then filed a claim for § 34A permanent and total incapacity benefits from June 29, 1995 to date and continuing, or in the alternative, for § 35 partial incapacity benefits from June 29, 1995 forward. Following a § 10A conference on September 26, 1995, the administrative judge ordered the self-insurer to pay partial incapacity benefits from June 29, 1995 and continuing based on an assigned earning capacity of $90.00 per week. Stone appealed, and a hearing de novo was held on May 2, 1996. (Dec. 3.)

Prior to the hearing, Stone was examined by an impartial physician pursuant to § 11A. The judge found the impartial examiner's report inadequate because it failed to address the gap period between the date of claimed incapacity, June 29, 1995, and the date of the impartial examination, February 2, 1996. (Dec. 3.) Reports of several other physicians were admitted into evidence, along with physical therapy records, diagnostic tests, office notes, and operative notes. In addition, the deposition testimony of Stone's treating physician, Dr. Sklar was also admitted. (Dec. 1-2.) Considering all these opinions, the administrative judge found that Stone's ongoing knee problems were causally related to her July 2, 1992 work injury. (Dec. 10.) However, he found her complaints about her back and about an allegedly disabling mental or emotional condition to be unrelated to her injury at work. (Dec. 10-11.)

Of significance to this appeal, the judge did not find persuasive Stone's testimony about her limitations and her pain because of inconsistencies between her testimony regarding the use of her cane and his observations as to the lack of wear on the cane. Stone testified that she had used a cane most of the time since December 1995. Following her testimony, the judge examined the cane and found no wear at all on its tip. Stone was given the opportunity to clarify her prior testimony, and further testified that she had used the cane only about five times in five months. The judge then found that Stone's credibility had been impeached due to the inconsistencies in her testimony and due to the absence of wear on the cane. Rather than rely on her testimony regarding her pain and limitations, he relied on the medical opinions of Dr. Sklar, "whose opinion it is that Stone has objective signs of incapacity, and physical objective signs of a condition that could cause pain with respect to her limitations." (Dec. 12.)

The judge went on to find that Stone's complaints of pain were real and that her pain justified the removal of her knee cap, of which she was in imminent need. (Dec. 13-14.) He found that she was restricted from excessive stair climbing, squatting, kneeling and walking long distances. (Dec. 13.) However, based in part on the deposition testimony of her treating physician, Dr. Sklar, he found that she was capable of performing a sedentary job which did not require her to do frequent walking and which allowed her to get up often, put her leg up and put ice on it, as needed. (Dec. 13-17.) Due to these restrictions, the judge found that she was able to work in such positions as secretary, telephone operator, or receptionist, but only on a part-time basis. He went on to write:

> The Employee admitted that she has not looked for work. Accordingly, the Employee cannot support her claim for total incapacity benefits on the basis that she has not been able to find employment. See Mulcahey's Case, 26 Mass. App. 1 (1988); Ballard's Case, 13 Mass. App. 1069 (1982); 29 L. Locke, Massachusetts Practice, 2d ed. § 322 (1981 & Supp 1984).

(Dec. 19.) In further support of this finding, he adopted the testimony of a vocational expert, and assigned Stone an earning capacity of $90.00 per week. (Dec. 20.)

Stone appeals from the decision, first arguing that the administrative judge abused his investigative power by examining her cane for signs of wear and failed to make adequate subsidiary findings as to why he found her testimony not credible. We find no merit in these arguments.

Stone testified at the hearing, and the administrative judge could quite properly consider matters bearing on her credibility in deciding what weight to accord her testimony. Contrary to Stone's contention, questions of credibility based upon personal observations of the fact finder are not subject to our review. An administrative judge's determination of the evidentiary weight and credibility, particularly where the witness being judged appeared before him, is final. Lettich's Case, 403 Mass. 389, 394 (1988).

An administrative judge has the statutory authority at hearing to "make such inquiries and investigations as he deems necessary . . .." G.L. c. 152 § 11. The judge had the authority to inspect the cane, which the employee brought to the courtroom. The judge could properly infer that Stone's testimony that she used the cane "[m]ost of the time" was untruthful, from his observation that the cane was not worn at all on the finish. (Dec. 12.) The judge was under no obligation to believe Stone's further explanation, given only after he revealed his observation, that she meant she used her cane only when she went out, which she said was infrequently. (Tr. 78.) The judge's conclusion that this circumstance impeached Stone's credibility, and therefore he was unpersuaded by her testimony about her limitations and pain, was not arbitrary or capricious. We therefore affirm it. G.L. c. 152, § 11C.

Nevertheless, we agree with Stone that the decision is flawed. The judge found that "[t]he Employee admitted that she has not looked for work." (Dec. 19.) The judge concluded that without evidence of an unsuccessful search for work, Stone could not support her claim for total incapacity benefits on the grounds that she had not been able to find suitable employment. (Id.) However, as the self-insurer concedes, Stone did testify about her attempts to find a job. (Tr. 40-43; 61-67, 75-76.) Because the erroneous finding that Stone had not sought employment contradicted her contention that she was unable to obtain suitable employment in the competitive labor market, it was harmful and

mandates reversal of the incapacity decision based upon it. See Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 275 (1990).

The judge correctly applied the law. "Without a showing of attempts (unless they would be futile) to secure employment, a claimant cannot support a claim of total [incapac]ity on the basis that employment is unobtainable." Ballard's Case, 13 Mass. App. Ct. 1068, 1069 (1982). However, the judge had the wrong facts. (Dec. 19.) Although evidence of a search for work is not necessary in every claim for §§34 or 34A benefits, id., it was proffered in this case.[1] Here Stone testified about her efforts to find employment[2] and the insurer presented labor market evidence from a vocational expert. (Dec. 19-20; Tr. 83 et seq.) The credibility and weight of this testimony is for the administrative judge to decide. The record does not compel the conclusion that Stone made a good faith effort to find suitable work that was unsuccessful due to the reluctance of employers to hire someone with her limitations. Nor does the record compel the conclusion that her search for work would be futile due to the absence of suitable work in her labor market. Because the record would support more than one factual conclusion about Stone's ability to obtain remunerative employment, we recommit for a new determination of the extent of Stone's incapacity. See Messersmith's Case, 340 Mass. 117, 123-124 (1959) (discussing propriety of remand versus reversal). On recommittal, the judge shall award incapacity benefits based on the highest amount that Stone is capable of earning with a reasonable use of all her powers, mental and physical. See Federico's Case, 283 Mass. 430, 432 (1933) and G.L. c. 152, § 35D. In light of the

[1] Hence, this is not a situation like Mulcahey's Case, 26 Mass. App. Ct. 1 (1988), where neither party presented labor market evidence.

[2] Stone testified that she applied for two jobs with the Commonwealth of Massachusetts (Tr. 41) and contacted approximately three dozen other potential employers. (Tr. 43.) She further testified that most of the jobs she applied for were in the secretarial field, but that they required bending, which she could not do, or computer skills, which she did not have. (Tr. 64.) She also testified that she had to be certified as employable in order to receive computer training, but Dr. Sklar would not release her for employment. (Tr. 62.) However, even if she had taken a computer training course, she did not think that, at the time of the hearing, she would be capable of doing any job due to her pain. (Tr. 67, 76.)

passage of time on appeal, the judge may take such additional evidence as he deems necessary to do justice.

So ordered.

Suzanne E.K. Smith
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: July 22, 1999