COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 049789-95**

Sharon Fortier	Employee
Ambulance Systems of America	Employer
Liberty Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
JoAnn D. Walter, Esq., for the employee
Andrew P. Saltis, Esq., for the insurer

MCCARTHY, J. Sharon Fortier is thirty-four years of age and a resident of New Bedford, MA. She had back surgery in 1991 as a result of an earlier industrial injury.[1] In December 1993, Ms. Fortier was hired as an emergency medical technician (EMT) by Ambulance Systems of America (ASA). On December 6, 1995, she suffered a low-back injury arising out of and in the course of her employment. The insurer accepted the case and paid weekly temporary total incapacity benefits based on an agreed average weekly wage of $402.71. Later, Liberty Mutual filed a complaint to terminate or modify weekly benefits. Following a conference the administrative judge denied the complaint. The insurer's appeal brought the complaint back to the same judge for a full evidentiary hearing. Testimony was taken from Ms. Fortier and Christopher J. Blach, Regional Manager for ASA. An impartial examination was conducted under § 11A by Dr. Peter Pizzarello on January 30, 1997.

On September 25, 1998, the hearing judge filed his decision. He found, among other things, that Ms. Fortier was not able to carry out the work offered to her by ASA. (Dec. 5.) The judge noted and adopted the opinion of the impartial examiner that Ms.

[1] There are no findings in the decision about this prior industrial injury. However, the employee testified about it and it is described in the insurer's brief. (Insurer brief 4.)

Fortier suffers from chronic low-back pain causally connected to the accepted industrial injury. He also adopted Dr. Pizzarello's opinion that the employee is medically disabled permanently and partially, limited in lifting to weights no greater than twenty pounds and is limited in her ability to bend, lift, stoop, push or pull. The judge then concluded that Ms. Fortier continued to be temporarily totally incapacitated until the date of the impartial examination, but as of January 31, 1997, had an earning capacity of $100.68. He allowed Liberty to discontinue temporary total incapacity benefits retroactive to January 30, 1997 and to begin payment of partial incapacity benefits on January 31, 1997 at the weekly rate of $181.22 based on the average weekly wage of $402.71 and an earning capacity found to be $100.68.[2] The employee appeals.

Ms. Fortier argues that the judge's hearing decision is arbitrary, capricious and contrary to law because after adopting the impartial physician's opinion on medical disability, it fails to analyze her vocational history, education, experience and complaints of pain in the process of assigning an earning capacity. We agree. Ms. Fortier testified at some length about her circumstances and limitations since the December 1995 industrial injury. She testified that she typically showers upon getting up and then returns to bed because standing is difficult and lying down is her most comfortable position; that she sleeps poorly and has a hard time getting comfortable, (Tr. 20); and that she spends most of the day in bed and eats dinner in bed. (Tr. 20.) She also testified that she drives her car two or three times a week and that the longest distance she has driven is about sixteen miles. (Tr. 47.) With respect to medical treatment she testified that for the eight months preceding the hearing she has treated with a neurosurgeon, Dr. Abramovitz. She also laid out her work history and testified about her complaints of low-back pain, muscle spasms and numbness. (Tr. 19-29.) The judge does not say whether he believes Ms. Fortier's testimony. While it is open to the hearing judge to believe all, some, or none of the testimony recited above, he may not totally ignore it.

[2] The judge does not explain how he arrived at precisely $100.68 as the earning capacity.

The determination of the extent of incapacity for work has two distinct aspects. The Supreme Judicial Court saw fit to quote at length on this issue from a treatise on Massachusetts workers' compensation law.

> "Compensation is not awarded for personal injury as such but for 'incapacity for work.' This concept combines two elements: physical injury or harm to the body, a medical element, and loss of earning capacity traceable to the physical injury, an economic element. Some benefits may be due for a physical injury which does not interfere with the employee's ability to earn his full wages. He would be entitled to medical and hospital care and, if left with a permanent physical handicap, to specific compensation under [G.L. c. 152,] § 36. But apart from such cases, an injury is not compensable unless the physical injury causes an impairment of earning capacity.
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> Incapacity for work is the common statutory basis of benefits for total, permanent and total, and partial disability. The degree of incapacity determines whether the disability is total or partial. The determination of loss of earning capacity involves more than a medical evaluation of the employee's physical impairment. Physical handicaps have a different impact on earning capacity in different individuals. Education, training, age and experience affect the ability to cope with the physical effect of injury. The nature of the job, seniority status, the attitudes of personnel managers and insurance companies, the business prospects of the employer, and the strength or weakness of the economy also influence an injured employee's ability to hold a job or obtain a new position. The goal of disability adjudication is to make a realistic appraisal of the medical effect of a physical injury on the individual claimant and award compensation for the resulting impairment of earning capacity, discounting the effect of all other factors . . ."

Scheffler's Case, 419 Mass. 251, 256 (1994), quoting L. Locke, Workmen's Compensation § 321, at 375-376 (2d ed. 1981) (footnotes omitted).

Nowhere in his decision does the hearing judge discuss how Ms. Fortier's age, work training and experience, education, and physical limitations affect her ability to perform remunerative work in the open labor market. Nor does he make a finding about the credibility of the employee's complaint of pain. The mere finding of a work history, adoption of a medical opinion and rote mention of vocational criteria is not enough. The

judge must analyze, however briefly, how these elements combine to support the assignment of an earning capacity. In the absence of such an analysis, it is impossible to review the judge's finding on this issue.

Accordingly, we return this case to the senior judge for reassignment to the hearing judge for further findings of fact with respect to extent and duration of loss of earning capacity.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **December 21, 1999**

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge