COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 048849-01

William Brown	Employee
Northeast Underpinnings, Inc.	Employer
Travelers Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Horan)

APPEARANCES

Michael J. Powell, Esq., for the employee
David G. Braithwaite, Esq., for the insurer at hearing
Ronald N. Sullivan, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from a decision awarding the employee, a fifty-eight year old pile driver, permanent and total incapacity benefits for an accepted work injury to his right shoulder. We affirm the decision.

On December 21, 2001, the employee tripped over an air hose and fell approximately fifteen feet onto his right shoulder. He underwent arthroscopic debridement of the rotator cuff, acromioplasty and resection of the coracoacromial ligament. The surgery included four anchors intended to fixate the retracted supraspinatus and subscapularis tendons. (Dec. 4.) The impartial physician opined that the employee was permanently partially disabled due to his significant right major shoulder injuries. The doctor restricted the employee from any work overhead, and any lifting or repetitive tool use with his right arm. The judge adopted the impartial physician's opinions, and credited the employee's testimony as to his constant shoulder pain, increased by cold weather and use. (Dec. 5.) Finding the employee had no transferable skills and was unable to secure and maintain meaningful work in anything resembling his former occupation, the judge concluded the employee was permanently and totally incapacitated. (Dec. 6-7.) The judge specifically did not credit the opinion of the insurer's vocational expert, finding that he did not "accurately consider[] the degree of the employee's pain upon his ability to return to work

in any full time meaningful fashion,"[1] and that "safety considerations would limit his ability to secure and maintain many of the positions identified" by the vocational expert. (Dec. 6; footnote added.)

The insurer argues on appeal that the employee had "an affirmative obligation to minimize his damages." (Ins. br. 11.) The insurer's argument essentially seeks to have the reviewing board overturn its decisions that explicitly decline to impose a duty to seek employment on employees claiming total incapacity. See, e.g., Ellison v. NPS Energy Services, 20 Mass. Workers' Comp. Rep. 345 (2006); Giannakopoulos v. Boston College, 18 Mass. Workers' Comp. Rep. 241 (2004), *aff'd* ., Mass. App. Ct., No. 2004 - J - 516, slip. op. (September 20, 2005) (single justice). We decline to do so. While evidence of an unsuccessful job search is relevant to a judge's vocational assessment, we continue to maintain that nothing in G. L. c. 152 (and particularly the earning capacity statute, § 35D) requires such evidence as a foundation for the award of § 34 or § 34A benefits. We find none of the insurer's arguments against Ellison and Giannakopoulos persuasive.

The insurer further argues the judge erred by crediting the employee's complaints of pain, and using that evidence as one of the bases for his incapacity analysis. In so arguing, the insurer again challenges our overall approach, first set out explicitly in Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65 (1990), and followed in numerous cases since. See, e.g., Cugini v. Town of Braintree School Dept., 17 Mass. Workers' Comp. Rep. 363 (2003). The gist of the insurer's argument is that the prima facie § 11A medical evidence should trump the Anderson rule that judges may credit pain to find total incapacity when the medical disability is only partial. We do not agree. We consider our approach to be well within the principles enunciated in Scheffler's Case, 419 Mass. 251, 259-260 (1994)(crediting employee's testimony of his limitations to reject impartial physician's opinion employee could return to former employment).

Finally, we find no merit in the insurer's challenge to the judge's incapacity analysis as unsubstantiated and lacking in specificity. The cited authority, Bolton v. Charles P. Blouin, Inc., 14 Mass. Workers' Comp. Rep. 71 (2000), is distinguishable. In that case, unlike the present matter, there was an "absence of precise findings on the degree of the

[1] We acknowledge the insurer's questioning of the "full time" designation. (Ins. br. 11.) However, in the context of the judge's vocational assessment as a whole, we consider the reference to fulltime employment to be of little consequence to his ultimate finding of the employee's inability to hold substantial, non-trifling employment. (Dec. 7.)

employee's pain and loss of concentration." Id. at 73. Here the judge made precise findings on the extent of the employee's pain. Otherwise, the insurer's argument simply questions the judge's choice of evidence to adopt and credit. As such, it does not present an appellate issue.

The decision is affirmed. The insurer shall pay employee's counsel a fee in the amount of $1495.34 under the provisions of G. L. c. 152, § 13A(6).

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **December 4, 2008**