COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 029924-96**

William Corbett	Employee
The Druker Company	Employer
Wausau Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson & Smith[1])

APPEARANCES
Nancy Hall, Esq., for the employee at hearing
Sean M. Beagan, Esq., for the employee on brief
Ana Mari deGaravilla, Esq., for the insurer at hearing
Daniel P. Napolitano, Esq., for the insurer on brief

WILSON, J. William Corbett was employed as the resident maintenance manager of an apartment building. In addition to a weekly salary, his employer provided Mr. Corbett with living quarters, a parking space and the use of a telephone. (Dec. 3-4.) On February 16, 1996, Mr. Corbett sustained distal digital amputations of three fingers while clearing snow from a snow blower at work. He underwent surgery that same day and returned to work on February 20, 1996. He continued to work as a maintenance manager until he was terminated on July 29, 1996. (Dec. 5; § 11A report.)

The insurer initially accepted liability for the injury. Mr. Corbett subsequently filed a claim for ongoing § 34 weekly total temporary incapacity benefits.[2] Following a § 10A conference, the insurer was ordered to pay weekly § 35 benefits at the rate of $250.06 from July 29, 1996 onward. Both parties appealed to a full evidentiary hearing. (Dec. 2.)

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[1] Judge Smith participated in the discussion of this case but no longer serves in the department.

[2] The employee's claim set apart a six month period, July 29, 1996 to February 29, 1997, for which he sought § 35 temporary partial incapacity benefits because he was receiving unemployment benefits. (Dec. 1.) See G.L. c. 152, § 36B.

The issues raised at hearing were incapacity and extent thereof and average weekly wages. The § 11A exam was conducted by Dr. Francis Wolfort, who opined that Corbett is totally and permanently disabled medically and limited to physical tasks excluding fine touch and manipulation as well as those requiring greater than light grip. Neither party deposed Dr. Wolfort. His report, deemed adequate, was the only medical evidence in the case. (Dec. 8; § 11A report.)

In her decision, the administrative judge determined that the employer-provided parking space, valued by the employee at one hundred dollars per month, was a "perk of the employment" and the basic charges for the telephone, having an estimated value of forty-seven dollars per month, was a business expense and that neither item could be properly included in the average weekly wage calculation. (Dec. 4.) The judge further found that, notwithstanding the opinion of the § 11A examiner, the employee had transferable skills for suitable work in the open labor market and was capable of earning $450 per week. (Dec. 6, 8, 9.) The employee appeals.

The first issue raised is average weekly wages. Mr. Corbett argues that the value of the parking space and the telephone should have been included in calculating his average weekly wages.

Section 1(1) of the Act defines average weekly wages as the "earnings of the injured employee . . . ." It further states that "[e]xcept as provided by sections twenty-six and twenty-seven of chapter one hundred forty-nine, such fringe benefits as health care plans, pensions, day care, or education or training programs provided by employers shall not be included in employee earnings for the purpose of calculating average weekly wages under this section." Lacking the guidance of precise judicial determination of this issue, we follow the logic of Bradley v. Commonwealth Gas Co., 11 Mass. Workers' Comp. Rep. 439 (1997). In that case we distinguished fringe benefits and reimbursable expenses, which are not properly included in average weekly wages, from anything of value received as consideration for work that constitutes real economic gain to the employee, such as tips, bonuses, commissions or room and board. Bradley, id. at 441, 442.

Section 1(9) of the Act couples the determination of average weekly wages to the Unemployment Compensation Act. See Barofsky v. Lundermac Co., Inc. 4 Mass. Workers' Comp. Rep. 135, 139-140 (1990), aff'd 411 Mass. 379 (1991). Section 1(s) of the Massachusetts Unemployment Compensation Act defines an individual's wages as "every form of remuneration of an employee . . . whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind, and all remuneration paid in any medium other than cash . . . ." G.L. c. 151A, § 1(s).

Applying these definitions, we see no distinction between the housing provided by the employer and the similarly provided parking space for this resident building manager. We thus determine that the value of the parking space should be included in the calculation of average weekly wages. We agree with the hearing judge, however, that the telephone, a reimbursable business expense, is akin to a fringe benefit and cannot properly be included in the average weekly wages calculation.

Mr. Corbett next argues that the assignment of a $450 earning capacity was arbitrary. The only medical evidence was the § 11A examiner's opinion that Mr. Corbett is totally and permanently disabled and limited to physical tasks excluding fine touch and manipulation as well as those requiring greater than light grip. (Dec. 8; Section 11A report.) The hearing judge, however, found Mr. Corbett capable of earning $450 per week on the open labor market.

It bears repeating that the determination of the loss of earning capacity involves more than a medical determination of an employee's degree of physical impairment. Scheffler's Case, 419 Mass. 251, 256 (1994). It requires an analysis of the particular employee's education, training, experience, age and ability to cope with the physical effects of his or her injury in obtaining remunerative work of a non-trifling nature in the open labor market. Id.; Frennier's Case, 318 Mass. 635 (1945).

In her decision, the hearing judge specifically found that Mr. Corbett returned full time to his pre-injury job and was terminated from his job five months post-injury for lack of performance. (Dec. 5.) That is, his termination owed to his failure to perform his

job, not to his inability to physically do so.[3] Furthermore, Corbett testified, and the judge found, that he had earned both a Bachelor of Science degree in Biology and a Master of Science degree in Medical Microbiology and that he had previously worked in the field of microbiology. The picture drawn by these findings is that of an intelligent and well-educated person with "transferable skills for suitable work in the open labor market." (Dec. 6.) Given this evidence and these findings, we cannot say as a matter of law that the assignment of a $450 earning capacity is arbitrary.

We reverse the finding that set the average weekly wages at $893.03, and order that the value of the parking space be added to the average weekly wages found by the judge. If the parties cannot agree on the monetary value of the parking space, a claim may be filed so that the issue can be adjudicated.

The decision of the administrative judge is affirmed in all other aspects.

So ordered.

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

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[3] The hearing judge found credible the testimony of the property manager that Corbett's duty to oversee contractors had to be reassigned because he inadequately performed that part of his job while other projects went unattended because Corbett failed to call in outside contractors. (Dec. 5.)