COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 17434-96**

Ana DeJesus	Employee
Morgan Goodwill Industries	Employer
Wausau Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine & McCarthy)

APPEARANCES
George N. Heos, Jr., Esq., for the employee
Ana Mari de Garavilla, Esq., for the insurer at hearing
Jean Shea Budrow, Esq., for the insurer on brief

CARROLL, J. In her appeal, the employee argues that the administrative judge erred in finding her capable of performing remunerative work and, therefore, awarding a closed period of § 35 benefits rather than ongoing § 34 benefits. Because the subsidiary findings regarding extent of incapacity are not reflective of the evidence, we recommit the matter to the judge for further consideration of a key piece of medical evidence and the general findings that flow therefrom.

Ana DeJesus was forty-seven years old at the time of the hearing in this matter. A native of Puerto Rico where she completed the eighth grade, she immigrated to the United States when she was seventeen. She earned a GED in this country. Her work history includes clothes folder at a laundromat, assembly line worker at a shoe factory, sewing kit maker, and non-working supervisor for a commercial cleaning company. (Dec. 5.)

In 1989 she began working for Morgan Memorial Goodwill as a garment inspector. This job required repetitive handling of garments weighing approximately 2900 pounds per day. She also priced clothing, using a hand squeezed pricing gun, and hung the clothing. Around February 1995, the employee developed pain and tingling or numbness in both arms, from her elbows to her forearms and wrists and into her fingers.

After being evaluated at University Hospital she was placed in wrist splints and given Motrin™. Following her initial evaluation, Ms. DeJesus returned to her usual job but continued to experience pain. Her pain increased in severity to the point that her employer felt she could not perform her job and, on April 15, 1996, she was sent home by her supervisor. On August 6, 1996, her employer notified Ms. DeJesus that it could not hold her job open any longer, and her employment was terminated effective August 2, 1996. She has not returned to any employment. (Dec. 5-7.)

Subsequent to her treatment at University Hospital, Ms. DeJesus received hydrocortisone shots in her wrists and underwent physical therapy. An electromyography and nerve conduction study done in January 1997 indicated reduced conduction in the ulnar nerves bilaterally, suggestive of ulnar nerve entrapment or compression neuropathy. In March 1997, she underwent a surgical ulnar nerve decompression and anterior transposition of the ulnar nerve in the right elbow followed by more physical therapy. She underwent the same surgical procedure on her left elbow in July 1997. (Dec. 7-8.)

The insurer paid Ms. DeJesus § 34 benefits on a without prejudice basis from April 15, 1996 to September 17, 1996. (Dec. 2; Insurer's Notification of Termination of Weekly Compensation form dated September 10, 1996.) Thereafter Ms. DeJesus filed a claim for additional benefits, which the insurer resisted. A § 10A conference was held, and the insurer was ordered to pay § 34 benefits from April 15, 1996 to February 28, 1997. Neither party appealed the order. (Dec. 2.)

The employee next filed a claim for further benefits on and after February 28, 1997, which the insurer denied. A § 10A conference yielded an order to pay § 34 benefits from March 29, 1997 to July 1, 1997, and § 35 benefits thereafter. Both parties appealed giving rise to a full evidentiary hearing. (Dec. 2-3.)

The issues at hearing were incapacity and extent thereof and causal relationship. Pursuant to § 11A, the employee was examined by Dr. Robert Provost. After *sua sponte* declaring the medical issues complex, the judge allowed the submission of additional medical evidence. The employee offered two reports of her treating physician, Dr. Oladipo, and the insurer proffered the reports of Drs. Shirazi and Runyon. (Dec. 2, 3, 4.)

In her decision, the administrative judge adopted various parts of the opinions of Drs. Preston, Oladipo and Shirazi, ultimately finding the employee not capable of performing her previous work but capable of performing light work. (Dec. 13.) The judge awarded § 35 benefits from March 1, 1997 to April 1, 1998, based on an assigned earning capacity of $100.00 per week. (Dec. 14.)

The employee's appeal centers on two subsidiary findings on extent of incapacity. Referring to Dr. Oladipo's June 23, 1998 report regarding the employee's condition on the date of his last examination, March 31, 1998, the judge wrote:

> I adopt his opinion that the Employee was disabled from performing the work of a garment inspector between March 1, 1997 and March 31, 1998. I adopt Dr. Oladipo's opinion that she may return to work that does not demand repeated upper extremity maneuvers and weight lifting.

(Dec. 10.) However, that statement is a mischaracterization of Dr. Oladipo's opinion. Dr. Oladipo neither indicated that the employee was disabled only from her previous work as a garment inspector nor that she was, at the time of his examination, able to return to lighter work. Rather, Dr. Oladipo opined that:

> She was totally disabled from her work between April 15, 1996 and March 31, 1998. She **will** however **be able to return to other vocation** [sic] that does not demand repeated upper extremities maneuvers and weight lifting. . . . She **will . . . recover** to a level where she can return to **some form of gainful employment, most likely in a different field**.

(Employee Exh. 4.) (Emphasis added.) While, under most circumstances, it may be reasonable to infer that the phrase "her work" means that Ms. DeJesus is disabled only from her work at the time of the injury, that is not a reasonable inference within the context of Dr. Oladipo's other statements quoted above. The use of the future tense ("will . . . be able" and "will recover") in reference to the employee's ability to return to "other vocation[s]" and "some form of gainful employment, most likely in a different field" makes it clear that Dr. Oladipo's opinion is that, at some point in the future, though not at the time of examination, Ms. DeJesus will be able to return to some form of lighter work than garment inspecting.

Findings must be based on the record evidence, and inferences drawn therefrom must be reasonable. Emde v. Chapman Waterproofing Co., 12 Mass. Workers' Comp. Rep. 238, 242 (1998); Kakamfo v. Hillhaven West Roxbury Manor Nursing Home, 14 Mass. Workers' Comp. Rep. _____ (July 20, 2000). Otherwise, such findings are arbitrary and capricious and cannot stand. Emde, supra at 242; O'Rourke v. Town of West Bridgewater, 13 Mass. Workers' Comp. Rep. 415, 420 (1999). Findings which mischaracterize medical testimony are thus arbitrary and capricious. Ata v. KGR, Inc., 10 Mass. Workers' Comp. Rep. 56, 57 (1996). The judge's conclusion that the employee was capable of light work as of March 1, 1997, to the extent that it is based on Dr. Oladipo's opinion, cannot be sustained because it is not based on Dr. Oladipo's report[1] or reasonable inferences drawn from his statements, but is, rather, a mischaracterization of his testimony.

The judge's finding of partial incapacity from March 1, 1997 to March 31, 1998 is further undermined by her earlier finding that the employee underwent surgery twice during this time period, in March 1997 and in July 1997. (Dec. 8.) While surgery does not necessarily mandate a subsequent award of § 34 benefits, see, e.g., Marchand v. Waste Mgmt of Mass., Inc., 14 Mass. Workers' Comp. Rep. _____ (November 17, 2000), the judge must make findings regarding the impact of the surgery on the employee's work capacity.[2] Ortiz v. N.A.A.C.O., 10 Mass. Workers' Comp. Rep. 324, 327 (1996); Gherardi v. Rexnord, Inc., 7 Mass. Workers' Comp. Rep. 229, 230 (1993).

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[1] Dr. Oladipo's first report, dated July 6, 1997, which was also adopted by the judge, does not contradict his second report. In it, he stated: "She was totally disabled from her work from April 15, 1996 and [sic] July 1, 1997. She will however tolerate light duty, particularly with the improvement of symptoms observed in the right upper extremity following surgery." (Employee Exh. 5.)

[2] The judge found that, as of July 6, 1997, the employee had had a remarkable improvement in her right arm as a result of surgery performed on March 11, 1997. (Dec. 9.) However, the judge made no findings regarding her extent of incapacity prior to July 6, 1997, and she also found that at that time, the employee had significant symptoms in her left arm. Id. Similarly, the judge adopted Dr. Preston's testimony that, on September 29, 1997, two months post surgery on her left elbow, she was not at a medical end result (Dec. 10), but made no clear findings as to the impact of that second surgery on her work capacity. She also adopted Dr. Preston's opinion that "**if** her left arm improved similarly to her right arm, she can do light duty work, including light

On recommittal, therefore, the judge must re-examine the medical evidence in light of what Dr. Oladipo actually stated, and she must take into consideration the two surgeries during the period in question. If she still believes Ms. DeJesus is only partially incapacitated, she must support her conclusion with adequate subsidiary findings based on the evidence of record. Miranda v. MBTA, 12 Mass. Workers' Comp. Rep. 266, 267 (1998).

So ordered.

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: **December 14, 2000**
MC/jdm

repetitive work, with no lifting over ten pounds." Id. (Emphasis added). This opinion, as recited by the judge, does not support a finding of partial incapacity, but, like that of Dr. Oladipo, indicates that the employee's ability to work is contingent upon some future improvement in her left arm.