COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 106189-86**

Carolyn Crowley	Employee
Analogic	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Carroll and Maze-Rothstein)

APPEARANCES
Emmanuel N. Papanickolas, Esq, for the employee
Dennis Maher, Esq., and Jean Shea Budrow, Esq., for the insurer at hearing
Jean Shea Budrow, Esq., for the insurer on appeal

WILSON, J. The employee appeals from a decision in which an administrative judge denied her claim for permanent and total incapacity benefits, and assigned her a minimal earning capacity of $101.25 per week. One finding gives us pause, and we recommit the case as a result.

On July 21, 1986, Ms. Crowley suffered an injury to her lower back while at work, which injury the insurer accepted. (Dec. 4-5, 7.) She was out of work for approximately four months, and then returned to work with the employer. The employee worked there until 1988, and then worked for Bay Area Visiting Nurses as a medical record keeper/receptionist from 1988 until September 1990, when she left that job due to the amount of time she was required to sit. (Dec. 6-7.) She has not worked since that time. The employee was paid § 34 benefits subsequent to the 1986 injury, and again after she stopped work, until exhaustion of those benefits on November 2, 1995. (Dec. 5.)

The employee has treated with several doctors using various modalities. (Dec. 7-9.) Suffice it to say that nothing has given the employee any lasting relief from her constant pain. (Dec. 14.) The employee filed the instant claim for § 34A benefits in 1999, (Employee brief 2), which claim commenced as of the exhaustion of her § 34

benefits in 1995. After the § 10A conference, at which partial incapacity benefits were ordered to be paid, both parties appealed to a full evidentiary hearing. (Dec. 3.)

On August 29, 2000, the employee underwent a medical examination pursuant to § 11A(2). The impartial examiner diagnosed the employee as having suffered a severe lumbar strain with multiple disc herniations casually related to the industrial accident, overlaid on a pre-existing degenerative disease at L5-S1. The doctor opined that the employee was disabled from returning to the employment at which she was injured, as an assembly worker with multiple lifting activities. The doctor did opine that the employee was capable of performing sedentary work with the several restrictions of changing position every thirty minutes, and no bending, lifting, squatting, climbing, lifting repetitively or over fifteen pounds. The judge adopted the § 11A physician's opinions as of the date of his examination and continuing. (Dec. 11-13.)

The judge allowed additional medical evidence for the period of incapacity in dispute from November 1995 until the impartial examination in August 2000. (Dec. 4.) Of note for the purposes of this appeal are the opinion of one of the employee's treating physicians, Dr. Valente, who considered that the employee's symptomatology remained essentially unchanged throughout the disputed period, (Dec. 10), and the opinion of the insurer's expert, Dr. Saslow, who stated that the employee could not return to her previous work, and should not do any work requiring lifting, pushing or pulling heavy objects. (Insurer Ex. 4.)[1]

The judge credited the testimony of the employee regarding her pain and limitations. The judge specifically found that "[h]er condition has worsened as time goes

[1] The employee is correct that the judge erred by finding that Dr. Saslow stated that the employee *could* return to her previous employment. We see the error as harmless, however, because the judge specifically adopted Dr. Saslow's opinion "in part" only as to the limitations on her lifting, pushing and pulling, and was silent as to the capability of doing the previous job. (Dec. 11.) Moreover, the judge also specifically adopted the impartial physician's opinion that the employee could *not* return to her previous job, and did not differentiate in any way between the period of disability covered by that opinion and the earlier gap period. (Dec. 17.) Nonetheless, since we are recommitting the case for another reason, the judge should correct the erroneous finding as to Dr. Saslow's opinion, in any event.

on and she is in pain constantly" and "[s]he is in more pain and needs stronger medication." (Dec. 14).

The judge concluded that the employee was capable of performing entry level, sedentary clerical work fifteen hours a week, with an earning capacity of $101.25 per week, based on the physical restrictions stated by the impartial physician, (Dec. 16), along with the restrictions delineated in medical reports, such as Dr. Saslow's, during the 1995–2000 time frame. (Dec. 11, 17.) The judge noted that, although the employee has always had some level of pain post-injury, there were several references in the medical reports that she was tolerating that pain. (Dec. 11.)

The need for recommittal arises from the judge's findings that the employee's condition has *worsened* during the disputed period of disability, commencing as of the exhaustion of temporary *total* incapacity benefits in 1995, (Dec. 14), and her conclusion that the employee has had an earning capacity throughout that same period. (Dec. 16-17.) Although the receipt of § 34 benefits certainly confers no res judicata effect on future claims for incapacity benefits, entitlement for which the employee must always prove anew, see Bolton v. Charles F. Blouin, Inc., 14 Mass. Workers' Comp. Rep. 71, 73 (2000), citing Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988), the findings of a worsening and more pain following a period of total incapacity are difficult to reconcile with the assignment of even a modest earning capacity. "We should be able to review the judge's findings and clearly understand the rationale of the ultimate conclusion." Bolton, supra, citing Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993).

With these considerations in mind, we recommit the case for further findings.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **June 25, 2002**

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge