COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 056079-96**

Kimberly White	Employee
United Parcel Service	Employer
Liberty Mutual Insurance Company	Insurer

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

APPEARANCES
Thomas J. Canavan, Esq., for the employee
Ralph J. Cafarelli, Esq., for the insurer

MCCARTHY, J. Kimberly White, who was twenty-six years of age at the time of the hearing, is a high school graduate and holds a Class C motor vehicle operator's license. (Dec. 2.) In August 1994, she started working for United Parcel Service (UPS) sorting packages and loading trailers. Id. She worked about five hours a night without a break, totaling about twenty-seven hours per week.[1]

UPS required that packages weighing in excess of seventy pounds be handled by two employees. In practice, however, this rule was rarely followed. (Dec. 3.) After five months on the job, the employee began to experience soreness in her left shoulder region. Four months later, she informed her supervisor that she was experiencing shoulder trouble due to the heavy work.[2] The supervisor assigned the employee to

[1] From February 1995 through March 1997, Ms. White was concurrently employed by a Brockton newspaper delivering newspapers in bulk to retail outlets. Her average weekly wage there was $230.00. (Dec. 3.) The employee's other work experience includes office clerical and school bus driving. At the time of the decision, Ms. White was concurrently working as a merchandiser and self-employed in a telecommunications business. Id.

[2] Ms. White did not report the problem sooner as she hoped to make a career with UPS. (Dec. 3.)

lighter work washing trucks. (Dec. 3-4.) Ms. White did that work until she left UPS in April 1997. (Dec. 2, 4.)

Ms. White treated with Dr. Scott Oliver, an orthopedic physician, who operated twice on her left shoulder. The employee's claim for c. 152 benefits based on a left shoulder injury was resisted by the insurer. After a conference denial, Ms. White appealed to a hearing de novo. (Dec. 2.)

On July 22, 1998, the employee was examined by Dr. John F. McConville, an orthopedic surgeon, under the provisions of § 11A(2).[3] (Dec. 5.) Doctor McConville felt that the employee was capable of resuming employment as a part-time truck driver[4] but restricted her from lifting items in excess of thirty pounds. (Dec. 6.) He concluded that the employee had reached a medical end result. (Dec. 7.)

Additional medical evidence was introduced by both parties after the administrative judge allowed the employee's motion to open the medical evidence. (Dec. 2.) Medical reports of Dr. John Richmond were submitted on behalf of the employee. The insurer entered into evidence medical reports of Dr. Mordecai Berkowitz and Dr. DeWitt Brown.[5] (Dec. 1.)

Doctor Richmond opined that the employee's left shoulder condition was caused by repetitive shoulder stress at work; that she was completely disabled from May 9, 1997 up through March 1, 1999 and, that she has a permanent, partial impairment of her upper left extremity.

The judge found that Ms. White sustained a work-related injury to her left shoulder that ultimately became so symptomatic that she could not continue to work. (Dec. 8.) She adopted the §11A examiner's opinion as to diagnosis, prognosis and

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[3] Subsequent to the impartial examination, the employee underwent a third surgical procedure on November 4, 1998. (Dec. 7.)

[4] The § 11A examiner was under the mistaken impression that the employee operated a truck for UPS in addition to sorting and loading packages. (Statutory Ex. 1.)

[5] Dr. Berkowitz examined the employee, on behalf of the insurer, on April 22, 1998 and Dr. Brown's exam took place on July 9, 1999. (Dec. 7.)

causation, as well as the medical opinions of the employee's treating physicians as to diagnosis, causation and medical limitations. (Dec. 8.)[6] The judge then ordered the insurer to pay compensation benefits as follows: (1) §34 benefits from March 20, 1997 to April 10, 1997; April 24, 1997 to September 30, 1997 and from November 4, 1998 to December 7, 1998; (2) §35 benefits at various rates due to variations in earning capacity for the time periods of April 11, 1997 to April 23, 1997, October 1, 1997 to August 1, 1998, December 8, 1998 to March 1, 1999; (3) payment of all reasonable and necessary medical expenses for the diagnosed condition; (4) legal fees to the employee's counsel; (5) and interest under §50. (Dec. 10-11.) The employee appeals, raising one issue.

The employee argues that the termination of § 35 benefits on March 1, 1999, was " . . . arbitrary and capricious and contrary to the medial evidence introduced by both parties on the hearing record." (Employee's brief, 2.) Doctor Richmond, an attending physician, opined on March 1, 1999 that the employee had a permanent, partial impairment of her upper left extremity. The judge adopted this opinion. Although the employee concedes that physical limitations constitute only one factor to be considered in deciding the issue of incapacity, she maintains that the judge must still explain her findings and reasoning within the body of her opinion to enable proper appellate review. (Employee's brief, 11-12, citing Carney v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 494 (1995).) The employee argues that the judge's decision has failed to do so. We agree.

Contrary to the judge's finding that Dr. Richmond did not offer "an opinion regarding any medical disability beyond March 1, 1999[,]" (Dec. 8), Dr. Richmond actually opined that the employee "was completely disabled . . . up until her evaluation on 3/1/99" and that thereafter, the employee had a "permanent partial impairment of her left upper extremity." (Employee's Ex. 3, emphasis added.) Despite adopting this medical opinion, (Dec. 8), the judge determined that as of March 1, 1999, the employee

[6] These opinions conflict on the question of causal relationship but that issue is not before us.

had reached a medical end result without any diminution in earning capacity. Indeed, the judge noted that, "[E]ach of the physicians who has examined or treated the employee has set restrictions as a result of her injury at the time of their respective examinations." (Dec. 7.) This includes the insurer's medical experts and the § 11A examiner.

The judge does not explain her ultimate conclusion that the employee returned to her pre-injury earning capacity as of March 1, 1999. If Ms. White's earning capacity and corresponding entitlement to weekly benefits changed on March 1, 1999, there must be supporting evidence which is adopted by the judge. Ortiz v. N.A.A.C.O., 10 Mass. Workers' Comp. Rep. 324, 327 (1996).

We recommit the case to the hearing judge to review and reconsider the date selected to terminate weekly § 35 benefits. If she deems it appropriate, the judge may permit additional testimony before filing her decision anew.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **March 23, 2001**

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge