COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 13656-97**
Melissa Loudenslager	Employee
Mass. College of Art	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine & Maze-Rothstein)

APPEARANCES
Michael A. Torrisi, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals from the decision of an administrative judge arguing that the award of weekly § 34 total incapacity benefits as well as the failure to order recoupment of monies paid pursuant to a § 10A conference order was arbitrary and capricious. Finding merit in the self-insurer's arguments, we reverse the award of § 34 benefits and recommit the case for further findings.

Melissa Loudenslager was thirty-nine years old at the time of the hearing. The holder of a master's degree in fine arts in the area of ceramics, she worked at a variety of jobs over the course of her adult life. Prior to her 1996 employment with the Mass. College of Art as the studio manager, she worked as a cook, caterer, bartender, waitress, restaurant dining room manager and horticulturist. She also taught pottery classes and designed environmental interiors. (Dec. 410-411.)

Her employment at Mass. College of Art required the employee to maintain the equipment, which included dismantling and cleaning the potter's wheel and repairing equipment; she also removed trash, maintained the studio budget and accepted and stored shipments of supplies weighing up to 24,000 pounds. (Dec. 411.)

On April 17, 1997, the employee cleaned the sink traps of accumulated sludge. She performed the job in a bent over position, eventually filling twenty-two garbage bags weighing about seventy pounds each. She then lifted and heaved the bags into a

dumpster. At the completion of this task she experienced excruciating back pain. (Dec. 411.)

Ensuing medical treatment consisted of chiropractic treatments, physical therapy and aqua therapy. An MRI revealed a herniated disc at L4-5 and a bulging disc at L5-S1. Up to the hearing date, the employee continued to experience back pain, periodic leg pain and a shocking sensation in her arms, legs and back, and had difficulty sitting, standing and sleeping. (Dec. 412.)

The employee filed a claim for § 34 benefits which the self-insurer resisted. Following a § 10A conference, the self-insurer was ordered to pay continuing § 34 benefits commencing with the date of injury. The self-insurer appealed to a hearing de novo. (Dec. 408, 410.) Pursuant to § 11A, the employee was examined on June 12, 1998 by Dr. David Glazer. Dr. Glazer opined that the employee suffered from an L4-5 disc herniation and L5-S1 disc degeneration which he causally related to her April 17, 1997 work injury and that she was partially disabled. (Dec. 413-414, 416.)

In his decision, the administrative judge adopted the opinions of Dr. Glazer and found the employee to be partially "disabled"[1] as of June 12, 1998, (Dec. 414, 415, 416)

---

[1] **"**The terms 'incapacity' and 'disability' are words of art in the Massachusetts workers' compensation system." Medley v. E.F. Hauserman Co., 7 Mass. Workers' Comp. Rep. 97, 99 (1993). "[Incapacity] combines the elements of physical injury or harm to the body, the medical element, and loss of earning capacity traceable to the physical injury, the economic element." Blakely v. Jan Cos. (Burger King), 10 Mass. Workers' Comp. Rep. 219, 220 (1996). "[M]edical disability and work incapacity are distinct concepts married generally through examination of vocational factors[.]. . ." Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 172 (1995).

The administrative judge continually used the term "disabled" when he at times clearly meant "incapacitated." He correctly used the term "disability" when speaking of the doctor's medical opinion that the employee was "partially disabled," (Dec. 413-414, Glazer Dep. 25), but used the term "disability" to mean both medical disability and incapacity when he accepted that an overpayment occurred because of an award of total incapacity at conference and the evidence showed only a partial incapacity at hearing. (Dec. 414-415.) That the judge used the terms interchangeably is evident by the fact that the judge said he awarded "total disability compensation" at conference and awarded "total and partial disability" at hearing. He meant "incapacity" benefits because an employee "is not entitled to compensation for an industrial injury . . . resulting in a physical disability if there is no impairment of earning capacity." Medley, supra at 99, quoting Atkin's Case, 302 Mass. 562, 564 (1939). Therefore, to be

but awarded § 34 temporary total incapacity benefits from April 19, 1997 (2 days after the work injury) until July 15, 1999, the date of his decision. (Dec. 416, 417.)

The self-insurer argues that the judge's award of total incapacity benefits was legal error. We agree. There is no supporting medical opinion for the judge's award of any incapacity benefits from April 19, 1997 up to the impartial medical exam on June 12, 1998.[2] The self-insurer and employee agree on this point. (Self-insurer's brief, 7-8, Employee's brief, 11.) However, "Given his ultimate conclusion and award of weekly benefits, the judge obviously found merit in [Ms. Loudenslager's] claim. The judge should have allowed the presentation of additional medical evidence . . . sua sponte . . . ." See Burgos v. Superior Abatement, Inc., 14 Mass. Workers' Comp. Rep. ___ (July 20, 2000), quoting George v. Chelsea Housing Authority, 10 Mass. Workers' Comp. Rep. 22 (1996). The case must be recommitted to receive additional medical evidence for the gap period between April 19, 1997 and the impartial exam of June 12, 1998. The judge must then make findings on the employee's incapacity during that period.

Although the judge found the employee to be partially incapacitated as of June 12, 1998, based on Dr. Glazer's opinion of medical disability at that time, and based on factoring in a vocational analysis and determining that the employee had an earning capacity of $240.00 per week, (Dec. 414-418),[3] the judge, nevertheless, awarded the employee § 34 total incapacity benefits from June 12, 1998 to July 15, 1999, the date of the decision. (Dec. 417.)

The judge explained his reason for awarding total incapacity benefits for a period when the employee was only partially incapacitated as follows:

> The Review[ing] Board has held in the case of Brown v. Highland House Apartments, 12 Mass. Workers' Comp. Rep. 322 (1998) and Boyd v.

---

awarded any weekly compensation benefits the employee must have been incapacitated and not just medically disabled.

[2] Although there was questioning of the impartial examiner with respect to the period prior to his exam, the judge sustained objections to those questions. (Glazer Dep. 48-50; Dec. 418.) No claim of error is made with respect to those rulings.

> Sciaba Construction, 12 Mass. Workers' Comp. Rep. 427, 429 (1998) that a recoupment order is "discretionary". In Brown the Board held that "a judge may order none, some or all of the overpayments as appropriate". Id. at 326. In the the [sic] Boyd case, the Review[ing] Board held that the judge should apply a test of "fundamental fairness", balancing "several equitable considerations including the degree of culpability of the worker, the employer's negligence, the employee's ability to repay, the hardship the worker would suffer and the amount of the overpayment". Boyd at 429, Brown, at 326, note 7.
>
> . . . In applying a test of "fundamental fairness" as required by the Review[ing] Board, I find that any order of recoupment would be unfair and unjust. Therefore, the reduction of benefits shall begin with the issuance of this decision.

(Dec. 415-416.)

The judge's reliance on Brown, supra, and Boyd, supra, is misplaced. Section 11D(3) states:

> An insurer that has paid compensation pursuant to a conference order, shall, upon receipt of a decision of an administrative judge or a court of the commonwealth which indicates that overpayments have been made be entitled to recover such overpayments by unilateral reduction of weekly benefits, by no more than thirty percent per week, of any remaining compensation owed the employee. Where overpayments have been made that cannot be recovered in this manner, recoupment may be ordered pursuant to the filing of a complaint pursuant to section ten or by bringing an action against the employee in superior court.

Thus, section 11D(3) contains two methods for dealing with overpayments. The first method is a matter of right held exclusively by the insurer. The second method is a permissive one subject to judicial discretion.

Both Brown and Boyd involved situations where the second method controlled. In Brown overpayments were not engendered by receipt of a decision indicating that overpayments had been made pursuant to a conference order. Rather, the overpayment was the result of insurer error. Brown, supra at 324. In Boyd no further weekly benefits were owed from which the overpayment could be deducted. Boyd, supra at 429.

In the present case, recoupment is a matter of right under the first sentence of 11D(3). The insurer paid ongoing § 34 benefits pursuant to a conference order. When the administrative judge found the employee was only partially incapacitated as of June 12, 1998, he could not find the employee entitled to § 34 benefits -- in order to defeat the insurer's right of recoupment -- as of that date and until the date of decision. At least beginning June 12, 1998 (and possibly earlier depending on the judge's findings on recommittal as to the gap period), the employee is entitled to § 35 benefits, and the self-insurer is entitled to recover overpayments by up to 30 percent of the remaining compensation owed the employee.

In summary, the decision of the judge is affirmed insofar as he found partial incapacity as of June 12, 1998, the § 11A exam date, and assigned an earning capacity of $240.00 per week. His order awarding § 34 benefits from April 19, 1997 to July 15, 1999 is reversed. It is ordered that the employee receive § 35 benefits, based on the judge's assignment of a weekly earning capacity of $240.00, beginning June 12, 1998. The case is recommitted to the administrative judge to take additional medical evidence for the gap period between April 19, 1997 and June 12, 1998, and to make findings as to the employee's incapacity during that period. The amount of recoupment due will be determined when the judge makes findings as to the employee's incapacity during the gap period, based on the additional medical evidence taken. But the self-insurer is entitled to presently recoup overpayments for the period it paid § 34 benefits from June 12, 1998 through July 15, 1999.

So ordered.

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

Filed: **November 1, 2000**
MC/jdm