COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 024457-04

Michelle M. LaCharite	Employee
Registry of Deeds - Hampden County	Employer
Commonwealth of Massachusetts	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Horan)

APPEARANCES

Michael D. Facchini, Esq., for the employee
Nicholle M. Allen, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from a decision awarding the employee § 34 total incapacity benefits until the date of the evidentiary hearing, and ongoing § 35 partial incapacity benefits thereafter. (Dec. 5.) For the reasons that follow, we recommit the case to the administrative judge for additional subsidiary findings and reconsideration of his benefit award.

The employee, thirty-five years old at the time of hearing and a college graduate, was employed as a senior clerk in the Hampden County Registry of Deeds when she injured her back at work on August 6, 2004. She attempted to sit on a metal folding chair and it collapsed, causing her to fall on her lower back. (Dec. 3-4.) The diagnoses were a small central herniation at L5-S1, left leg sciatica, and posterior annular tears at the T-2 and L5-S1 levels. The employee underwent microdiscectomy at L5-S1. (Stat. Ex. 1.) The self-insurer accepted liability for the employee's injury and paid § 34 total incapacity benefits from and after the date of injury. On October 5, 2005, the self-insurer filed a complaint for modification or discontinuance of weekly compensation. (Self-ins. br. 1; Employee br. 2.) By § 10A order filed on April 11, 2006, the administrative judge denied the complaint, and the self-insurer appealed. (Dec. 2.)

Pursuant to § 11A, the employee underwent an impartial medical examination by Dr. Marc A. Linson on July 5, 2006. The judge deemed the doctor's report adequate and neither party moved for the admission of additional medical evidence. Dr. Linson was not deposed. (Dec. 2.) The impartial physician opined that the employee was restricted from work involving frequent bending, lifting over fifteen pounds, and prolonged standing, sitting or walking for more than

one hour without the opportunity to change position. He causally related these restrictions to the employee's 2004 work injury. (Dec. 4; Stat. Ex. 1.)

At the October 13, 2006 hearing, the only issues raised by the self-insurer were disability and extent thereof. (Dec. 2; Self-ins. Ex. 1.) The employee claimed ongoing total incapacity benefits from and after August 6, 2004 or, in the alternative, partial incapacity benefits from and after October 13, 2006. (Dec. 2; Employee Ex. 1.) The judge credited the employee's testimony that she suffers from low back pain with left leg sciatica; has great difficulty bending; cannot sit, stand or walk for more than thirty minutes at a time; and has to keep changing positions during the day. He found:

> The employee suffered a severe injury arising out of and in the course of her employment resulting in the above permanent restrictions. I find that [the employer's] job offer was made in good faith. However, there was no evidence that the employee would be provided part-time accommodated light duty. I also accept the employee's testimony that to return to computer work she will need updating of her computer skills. More importantly, the extent of her so-called "bad days" precludes any full-time work. It is even questionable whether employers in the open labor market would be willing to accommodate an individual with a rate of excessive absenteeism. However, the employee testified and conceded, which I find credible, that she could work 15 hours per week as of the date of the hearing. Her average weekly wage includes concurrent wages for a retail clerk position, a position she now admits she could work.[1] I find that given the employee's credible complaint of pain and the limitations it imposes on her daily life coupled with the so-called "bad days," that she is partially disabled with a maximum earning capacity pursuant to Section 35D of $127.50 per week (15 hours at $8.50 per hour). The earning capacity will coincide with her credible testimony at hearing.

(Dec. 4-5.) Based on the employee's pre-injury concurrent average weekly wage of $570.90 and the $127.50 assigned weekly earning capacity, the judge authorized the self-insurer to modify the

[1] At the time of her injury and for approximately three years before, the employee worked part-time as a cashier at a retail liquor store. (Tr. 15-16.) She acknowledged that she could work her previous fifteen hours per week schedule at the liquor store because she could sit at that job. (Tr. 86.)

employee's weekly incapacity benefit to $256.90 under § 35, effective October 13, 2006, the date of the hearing. (Dec. 5.)

The self-insurer argues the judge's decision is flawed by the absence of any subsidiary findings supporting the award of partial incapacity benefits. To the contrary, we think the above-noted findings amply reflect the judge's rationale for his award. Moreover, he made explicit findings as to the employee's education and prior work history.[2] As to the amount of the earning capacity assigned, we can fully "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). Having accepted the employee's concession that she could work fifteen hours per week at the liquor store cashier's job she held at the time of the injury, the judge simply multiplied her hourly pay rate of $8.50 at that job by fifteen. (Tr. 85-86.) Cf. Dalbec's Case, 69 Mass. App. Ct. 306, 317 n.11 (2007)(assignment of high earning capacity for specific job required more explanation in subsidiary findings; the "rational basis" must be "visible").

A thornier issue is whether, as the self-insurer argues, the judge failed to follow the dictates of G. L. c. 152, § 35D, by declining to assign the employee an earning capacity based on the employer's job offer of full time light duty work.[3] (Dec. 4.) As Dr. Linson's was the sole expert medical opinion in evidence, we look to his conclusions regarding the employee's work capacity:

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[2] The employee held a bachelor of arts degree in marketing. She had worked as a payroll coordinator for Milton Bradley Company, where she used various computer programs. She worked as an executive assistant to the vice-president of sales for another company, where she acquired additional computer skills. In her job with the Registry of Deeds, the employee's job duties centered around marketing and community outreach, but she continued working on a computer five to six hours per day. She maintained the monthly newsletter for her department and would often travel to senior centers in Hampden County promoting the Homestead Act. (Dec. 3.)

[3] In a letter to the employee dated September 14, 2006, the employer requested that she return to work as senior clerk in the Hampden Registry of Deeds on October 2, 2006, under the following conditions:

> The Office remains willing to accommodate the physical restrictions outlined in the Individual Written Rehabilitation Program memorandum prepared by Gerry Balut of

> I find that she does have reasonably explainable symptoms after her injury which has apparently traumatized both her back and a nerve to her left leg and that she is left with certain permanent impairments. I find her capable of full time work in a sedentary job, a job that involves no prolonged standing, sitting or walking for more than an hour without a chance to change position, no frequent bending and no lifting over fifteen pounds. Lifting should not be a central or key component of her required job. With these restrictions she is capable of full time resumption of employment, a job similar to what she was doing before but not as active and with much less bending and lifting than she was required to do before. With restrictions which I believe are permanent and causally related to her work injury of August 6, 2004, she would be capable of full time work. These opinions are to a reasonable degree of medical certainty and I consider her at a medical end result and I consider her work injury to be a major causal factor[4] in her ongoing permanent partial disability and impairment.

(Stat. Ex. 1.)

Curiously, the judge did not expressly adopt any of Dr. Linson's opinions. Nevertheless, just as a judge may credit an employee's complaints of pain and physical restriction to find total incapacity in the face of an expert opinion of only partial medical disability, Raymann v. Massachusetts Turnpike Auth., 21 Mass. Workers' Comp. Rep. 255, 259 (2007), citing Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39 (2002), it was the judge's prerogative here to accept the employee's testimony that she could work only a part-time schedule.

> Injury Management Resources on August 15, 2006. It is understood that you cannot lift anything heavier than ten (10) lbs., that you are not capable of bending or stooping and that you cannot sit for long periods of time. Your duties will include customer service, indexing and other related projects.

(Self-ins. Ex. 3.) The individual written rehabilitation program (IWRP) memorandum was not in evidence, and there is nothing in the record which indicates which medical opinion, if any, was used as the basis for the physical restrictions outlined in the memorandum.

[4] The self-insurer did not raise the provisions of § 1(7A) in the present disability proceeding.

See also, Larti v. Kennedy Die Castings, Inc. 19 Mass. Workers' Comp. Rep. 362, 370 (2005), citing Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65, 68 (1990). Therefore, the employer's offer of full time employment, even with accommodations, was not an offer of a "suitable job" within the meaning of § 35D(5): "For purposes of this chapter, a suitable job or employment shall be any job that the employee is physically and mentally capable of performing, including light work. . . ."

On one final point, however, we do agree with the self-insurer. The judge's findings leave unexplained his implicit award of § 34 benefits from the date of the impartial medical examination to the date of hearing at which the employee testified.[5] As we have noted, the only expert medical opinion in evidence was that the employee was capable of full time sedentary work with restrictions, as of the July 5, 2006 § 11A examination. (Dec. 4.) Even though the judge credited the employee's testimony that she experienced "bad days" on which she would be incapable of working, the physical restrictions he identified as controlling the type of job the employee could perform are the very same restrictions Dr. Linson imposed on the employee as of July 5, 2006. Indeed, the doctor reported that the employee told him "that she could do a sedentary job as long as it was flexible, allowed for frequent changes in position, [and] did not involve bending or significant lifting." (Stat. Ex. 1.) Thus, in the absence of any evidence indicating a change in the employee's condition between July 5, 2006 and October 13, 2006, absent explanation by the judge, we see no basis for his assignment of an earning capacity only as of the latter date. The fact that the employee claimed § 35 partial incapacity benefits, in the alternative, only as of October 13, 2006, does not control the judge's incapacity analysis. Cf. MacEachern v. Trace Constr. Co., 21 Mass. Workers' Comp. Rep. 31 (2007)(error for judge to address permanency of incapacity and to award § 34A benefits for period not claimed by employee).

Accordingly, we recommit this case to the administrative judge for further findings on the extent of the employee's incapacity from July 5, 2006 to October 13, 2006, consistent with this opinion.

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[5] Although the self-insurer placed the extent of the employee's disability at issue as of the October 5, 2005 filing date of its modification/discontinuance complaint, Cubellis v. Mozzarella House, 9 Mass. Workers' Comp. Rep. 354, 356 (1995), on appeal the self-insurer challenges the judge's award of total incapacity benefits only as of the July 5, 2006 impartial medical examination.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **June 30, 2008**