**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 07278-04**

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| Susan Corea | Employee |
| City of Chelsea School Dept. | Employer |
| City of Chelsea | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges McCarthy, Costigan and Fabricant)

**APPEARANCES**
Peter Georgiou, Esq., for the employee
Gerard A. Butler, Esq., for the self-insurer

**McCARTHY, J.** The employee appeals from a decision awarding her total incapacity benefits for a closed period. For the reasons that follow, we recommit the case for further findings.

Ms. Corea has worked as a teacher's aide since 1982. The judge found that her job required no prolonged standing, walking or sitting of more than thirty to sixty minutes and no significant postural movement including lifting, bending, stooping or reaching. (Dec. 4.)

The employee injured her low back and coccyx at work when her chair broke and she fell to the floor onto her buttocks on March 13, 2004. She treated conservatively and, except for a few days, has not worked since. (Dec. 4.)

Pursuant to § 11A, the employee underwent an impartial medical examination on August 2, 2005. The doctor opined that the employee suffered from traumatic coccydynia causally related to her fall at work, which partially disabled her as of the time of the examination. The doctor considered that her medical disability would be expected to last for six more months and opined that she was capable of light/sedentary work with no lifting greater than 25 pounds and the ability to sit or stand at will. (Dec. 5; Ex. 1.) The judge allowed additional medical evidence for the "gap" period from the March 13, 2004 work injury until the August 2, 2005 impartial medical examination. The

employee's motion for additional medical evidence, based on the inadequacy of the report or complexity of the medical issues, was otherwise denied. (Dec. 2-3.)

The judge adopted the following medical opinions of the employee's and the self-insurer's medical experts. The employee's medical expert, doctor, Dr. Robert Pennell, totally disabled her from working as of her February 7, 2005 examination. (Dec. 6.) The self-insurer's expert physician, Dr. Kenneth Polivy, opined that the employee sustained a lumbar contusion in her fall at work, and her resulting pain also involved pre-existing lumbar degenerative facet arthropathy. Dr. Polivy also opined that the employee did not have a displaced coccyx fracture, and that she was capable of performing full-time, light duty work as of her March 10, 2005 examination. (Dec. 6.)

The judge found that the employer made two bona fide job offers of modified duty work based on the restrictions outlined in the medical reports of the impartial physician and Dr. Polivy. (Dec. 4-5.) He went on to conclude that the employee was totally incapacitated until March 10, 2005, the date of Dr. Polivy's examination, at which point she was fully capable of returning to her prior light duty employment. (Dec. 7.)

The self-insurer raised § 1(7A)[1] in defense of the employee's claim. The judge concluded that the section did not apply to the employee's claim prior to March 10, 2005, when Dr. Polivy implicated pre-existing lumbar degenerative facet arthropathy as a cause of her pain and physical restrictions. The judge reasoned that, had he found any incapacity for work after March 10, 2005, the employee would have been required to prove the heightened standard of causation mandated by § 1(7A). (Dec. 8-9.)

[1] General Laws c. 152, § 1(7A), provides in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

The employee correctly argues that the judge's subsidiary findings on her diagnoses are internally inconsistent. The judge adopted both Dr. Polivy's opinion denying any involvement of the coccyx in the employee's medical picture, and the impartial physician's opinion that disables the employee due to a coccyx injury. We cannot discern for which injury – or both – the judge awarded benefits.

We recommit the case for the judge to clarify his adoption of the disparate medical opinions on the employee's diagnoses. We think another issue raised by the employee also warrants the judge's attention. We are troubled by the judge's assessment of the employee's ability to sit while driving her commute from Pelham, New Hampshire to Chelsea, Massachusetts. The employee's trip is close to thirty-five miles one way.[2] The adopted opinion of the self-insurer's expert, Dr. Polivy, limits the employee to thirty minutes of driving at one stretch. The judge reconciles the apparent divergence between the employee's limitation and the length of her commute by saying that she could make one stop.[3] (Dec. 7.) This may not be a reasonable option, particularly in a rush hour commute on a limited access highway such as Interstate 93. As such, we question whether the job offered by the employer is actually "suitable" within the meaning of § 35D.[4] However, we ask the judge to reexamine this issue on recommittal.

Finally, the employee contends that the self-insurer did not put forward sufficient evidence of a pre-existing, non-compensable medical condition to invoke the heightened causation standard of § 1(7A). See Gonzalez v. City of Lynn, 18 Mass. Workers' Comp.

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[2] We take judicial notice of the distance from the employee's address to her employer's address as calculated by "MapQuest."

[3] We pass no judgment on the judge's discrediting of the employee's estimate of her travel time. Suffice it to say, however, that the thirty-five mile trip in rush hour traffic probably cannot be made within Dr. Polivy's thirty minute limitation on driving.

[4] General Laws c. 152, § 35D provides that, absent actual earnings, the employee's post-injury earning capacity should reflect, where feasible, "[t]he earnings the employee is capable of earning in a particular suitable job" made available to him or her. § 35D(3). "[A] suitable job or employment shall be any job that the employee is physically and mentally capable of performing, including light work, considering the nature and severity of the employee's injury,

Rep. 195, 200-201 (2004). We note that the judge did not apply § 1(7A) in his order of benefits up to March 10, 2005. (Dec. 8.) However, should the judge on recommittal find that further benefits are due, further findings on § 1(7A)'s applicability will be appropriate.

Accordingly, we recommit the case for further findings consistent with this opinion.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***September 14, 2006***

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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so long as such job bears a reasonable relationship to the employee's work experience, education, or training, either before or after the employee's injury." § 35D(5).