COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 024537-02

Bennie Bowie	Employee
Matrix Power Services, Inc.	Employer
Beacon Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Horan)
The case was heard by Administrative Judge Heffernan.

APPEARANCES

Ronald L. St. Pierre, Esq., for the employee
Brenda J. McNally, Esq., for the insurer

FABRICANT, J. This case comes to us on cross appeals from a decision awarding the employee weekly § 34 total incapacity benefits from June 11, 2002 until April 23, 2005, and weekly § 35 partial incapacity benefits thereafter. The parties agree that the date on which the judge ordered partial incapacity benefits to begin is not grounded in the evidence. We concur, recommit the case for further findings, and summarily affirm the decision as to all other issues raised.

On June 11, 2002, the employee, a boilermaker in his fifties, fell several feet through a hole in scaffolding, into an eighteen to twenty foot long conveyor chute, landing on concrete. He was taken by ambulance to UMass Medical Center where he complained of pain in his neck, left shoulder, back and legs. He was treated with pain medications and a neck collar, and subsequently came under the care of a number of physicians due to continuing pain. He has not returned to work. (Dec. 6-7.)

The insurer resisted the claim. At a § 10A conference, the administrative judge ordered the insurer to pay weekly § 34 benefits beginning on June 12, 2002. (Dec. 5.) The insurer appealed to a hearing *de novo*.

On June 2, 2003, Dr. Panos Panagakos examined the employee pursuant to G. L. c. 152, § 11A, and opined that the work incident could have produced multiple contusions and sprains, though

he could not explain the employee's many extreme complaints or relate them to the fall of June 11, 2002. (Dec. 7.) He further opined that the employee did have pre-existing hypertrophic arthritis in his shoulder which required a subacromial decompression. (Dec. 9.) The employee's motion to submit additional medical evidence due to inadequacy and complexity was allowed, and both parties submitted medical reports and conducted the depositions of three physicians.[1] (Dec. 10-13.)

The judge found the employee had injured his low back and left shoulder in the fall at work on June 11, 2002. He adopted, in part, the opinion of Dr. Douglas Pavlak that the work injury remains a major cause of the employee's left shoulder and lumbar symptoms, and further adopted the opinions of Dr. Kreckel and Dr. Friedman that the flare-up of the employee's previously undiagnosed diabetes and resulting hospitalization on August 2, 2003, were due to an epidural steroid injection prescribed for his lumbar pain. The judge determined the employee's medical treatment for his lumbar and shoulder conditions was reasonable and necessary, and treatment for diabetes was reasonable and necessary for one month following his admission to the hospital. (Dec. 40-41.)

With respect to extent of incapacity, the judge adopted, in part, the opinion of Dr. Pavlak that, "the employee was temporarily totally disabled for a period of time and that [he] remains partially disabled." (Dec. 40.) The judge found, "based on the Employee's age, education, training, work history and partial disability, that he is capable of earning . . . $250.00 per week." Id. The judge further noted that, in determining the employee's earning capacity, he had considered the videotape evidence and investigative reports regarding surveillance done by the insurer, which were "inconsistent with Mr. Bowie's presentation on physical examinations."[2] (Dec. 27, 40.) Ultimately, the judge ordered the insurer to pay § 34 benefits from June 11, 2002 to April 23, 2005, and § 35 benefits thereafter. (Dec. 42.)

On appeal, both parties contend that the evidence does not support the date chosen for the termination of § 34 benefits and the commencement of § 35 benefits. The insurer urges that the medical evidence and surveillance videotapes support a modification of the employee's benefits

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[1] Depositions were taken of the employee's treating physicians, Dr. Douglas M. Pavlak and Dr. Dieter Krecker, and the insurer's examining physician, Dr. Charles DiCecca.

[2] Surveillance was performed on November 5, 2002, November 26, 2002, and October 30, 2003. (Dec. 20-21.)

from total incapacity to partial -- or even a discontinuance -- on a number of dates prior to April 23, 2005. (Ins. br. 22-24.) The employee maintains the evidence suggests his total incapacity persisted after April 23, 2005.[3] (Employee br. 5-7.) Both agree, however, that the record contains no support for modification of the employee's weekly benefits from total incapacity partial on the date chosen by the judge. (Employee br. 7; Ins. br. 22.)

It is axiomatic that factual findings as to when an employee's incapacity, whether total, partial, temporary or permanent, begins or ends must be grounded in the evidence found credible by the judge. MacEachern v. Trace Constr. Co., 21 Mass. Workers' Comp. Rep. 31, 36-37 (2007), and cases cited. In addition, the date chosen by the judge to terminate or modify benefits must be based on some change in the employee's medical or vocational condition. Foreman v. Highway Safety Sys., 19 Mass. Workers' Comp. Rep. 193, 196 (2006). Here, ostensibly based on Dr. Pavlak's opinion, the judge found the employee was temporarily totally disabled "for a period of time" and "remains partially disabled." (Dec. 40.) However, the judge cited no evidence in Dr. Pavlak's deposition or elsewhere in the doctor's written submissions to support the choice of April 23, 2005, as a date for modification of the employee's benefits from total to partial.[4] Furthermore, neither the judge's findings nor the evidence provide any indication the employee's vocational status changed at that time. A finding that the employee is partially disabled as of a specific date must "emerge clearly from the matrix of his subsidiary findings." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). Here, it does not.

On recommittal, the judge must choose a date for modification of the employee's benefits which is grounded in the evidence. If he again finds the employee entitled to partial incapacity benefits,

[3] The judge denied the employee's post-hearing motion, filed on April 23, 2008, to join a claim for § 34A benefits. (Dec. 21-26.)

[4] Dr. Pavlak testified on June 27, 2005, that his physician's assistant saw the employee on April 21, 2005, but he did not see him, and, in fact, had not seen him since February 2005. Neither Dr. Pavlak nor his physician's assistant opined as to a change in the employee's disability status on or around April 23, 2005, either via deposition or written report. (Pavlak Dep. 31; Employee Ex. 10, Medical Records Medical Rehabilitation Associates.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in the board file).

he must perform a more detailed vocational analysis supporting his earning capacity determination. See Eady's Case, 72 Mass. App. Ct. 724 (2008).

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **November 17, 2009**