COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031351-96**

James Ohop	Employee
Schott Fiber Optics, Inc.	Employer
Travelers Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
Walter J. Avis, Jr., Esq., for the employee on appeal
A. Ninoska Rosado, Esq., for the employee at hearing
Michael F. Ashe, Esq., for the insurer

MCCARTHY, J. James Ohop, who is now twenty-five years of age, started work as an apprentice glassmaker for Schott Fiber Optics in February 1996. On August 6, 1996, Mr. Ohop sustained a low-back injury when he slipped while in the course of his employment. As of the close of the hearing record, Ohop had not returned to work.

The insurer resisted the claim for benefits and the case came on for conference on January 30, 1997. The following day an order issued awarding weekly temporary total incapacity benefits under § 34 of the Act from August 7, 1996 to December 30, 1996 at the weekly rate of $202.32, based on an average weekly wage of $337.20. The order further directed payment of partial incapacity benefits under § 35 at the weekly rate of $139.32, based on an assigned earning capacity of $105.00 per week from December 31, 1996 and continuing. Cross appeals were taken from this conference order.

On April 8, 1997, Dr. John D. Colley performed an impartial medical exam under the provisions of §11A of the Act. Doctor Colley's report was found to be inadequate for the period preceding April 8, 1997 and the parties were granted permission to submit additional medical evidence covering the period August 7, 1996 to April 8, 1997.

Following a full evidentiary hearing, a decision was filed awarding Mr. Ohop weekly benefits under § 34 of the Act from August 7, 1996 through December 8, 1997 (the date of the hearing) and thereafter on going § 35 benefits from December 8, 1997 at a rate of $94.32 based on an assigned earning capacity of $180.00 per week. We have the case on appeal by the insurer.

The insurer first argues that the finding that Mr. Ohop was temporarily totally incapacitated until December 8, 1997 is arbitrary and capricious because it is a general conclusion unsupported by any subsidiary findings of fact grounded upon record evidence. We agree that it is difficult to see how the judge arrived at his conclusion. The § 11A examining physician was of the opinion that Mr. Ohop was partially medically disabled and the disability was temporary. (Dec. 4, Ex 1.) The hearing judge did find that as of the hearing date, Mr. Ohop was referred to an eight-week course of physical therapy but we cannot tell when this course begins or ends. (Dec. 4.) Without amplification, this finding in and of itself does not support a finding of temporary total incapacity. In reaching his conclusion as to extent of incapacity, the judge must consider the employee's age, education, training and work history in addition to the medical evidence. "The determination of loss of earning capacity involves both a medical evaluation of the employee's physical impairment and an economic assessment of how that impairment affects the employee's ability to earn wages." Thompson v. Tom Hague III Builders, 12 Mass. Workers' Comp. Rep. 303, 305 (1998). "[W]e should be able to look at [the] subsidiary findings of fact and clearly understand the logic behind the judge's ultimate conclusion[.]" as to incapacity. This conclusion "must emerge clearly from the matrix of his subsidiary findings." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993).

The insurer next argues that the use of the date of hearing as the date to reduce benefits from temporary total under § 34 to partial benefits under § 35 is arbitrary and capricious and contrary to law. While there may be valid factual reasons for using the hearing date to change or end benefits, on the record before us it appears that the hearing date bears no relationship to the employee's incapacity status. It is erroneous to use the

date of hearing as a modification or termination date without subsidiary findings indicating why this date is proper. Rossi v. Mass Water Resources Authority, 7 Mass. Worker's comp. Rep. 101, 102 (1993). The date used to terminate or modify benefits must be supported by the evidence. Sanchez v. City of Boston, 11 Mass. Workers' Comp. Rep. 235, 236-237 (1997). See also D'Angeli v. McDonald's Restaurant, 1 Mass. Workers' Comp. Rep. 193, 195 (1987).

Finally, the insurer argues that the judge failed to consider a job offer made by the employer as he reached his decision with respect to earning capacity. The judge did make a finding that "the employee has not been able to do the light duty work offered by the employer." (Dec. 5.) There are no other findings with respect to the nature of the work offered or why the employee would not be able to perform it. This issue bears further attention by the hearing judge on recommittal.

We return this case to the senior judge for reassignment to the hearing judge for further findings consistent with this opinion.

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed: **October 28, 1999**

_____
Sara Holmes Wilson
Administrative Law Judge

_____
Suzanne E.K. Smith
Administrative Law Judge