COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023476-95**

John Jackson	Employee
Raytheon Company	Employer
Raytheon Company	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Wilson and Carroll)

APPEARANCES
Ronald W. Stoia, Esq., for the employee
Donald E. Wallace, Esq., for the self-insurer

LEVINE, J. The employee and the self-insurer both appeal an administrative judge's decision awarding the employee ongoing § 35 partial incapacity benefits for his work-related back injury. The employee contends that the judge erred by failing to award the § 34A permanent and total incapacity benefits that he sought.[1] We summarily affirm the decision with regard to the denial of that claim. The self-insurer contends that the judge erred when he selected the date on which the employee's § 34 benefits were exhausted as the date to begin the § 35 benefits, as that date is not grounded in the evidence. We agree, and we recommit the case for further findings on the issue of when the employee's entitlement to § 34 benefits ended and his entitlement to § 35 benefits began.

The employee suffered a stipulated industrial injury to his back on June 18, 1995, when he tried to catch a heavy item that fell from a table. (Dec. 635, 638.) He left work a few weeks later. The disabling pain never disappeared despite the employee's undergoing two laminectomies. The employee's pain is in his lower back, and it radiates

[1] The present proceedings began when the self-insurer filed a complaint to modify or discontinue compensation; at hearing, the employee's claim for § 34A benefits was joined. (Dec. 637.)

down his left leg. Id. The employee attempted, without success, to return to work six times. His last attempt was in February 1998. (Dec. 638-639, 643.)

Pursuant to § 11A(2), the employee was examined by an impartial physician on January 7, 1998. The doctor diagnosed status post excision, L5-S1, right, and status post excision, L4-5, left, both related to the employee's work injury of June 18, 1995. The doctor found the employee to be permanently partially disabled, and unable to perform repetitive bending or lifting more than 20-25 pounds. He did not feel that the employee's symptoms were as severe as the employee claimed. The doctor opined that the employee could sit, stand and walk, if given the opportunity to change positions; however, he was not sure the employee could work a forty hour week on a sustained basis. (Dec. 642-643.)

The judge concluded that the employee was partially disabled as a result of the stipulated industrial injury. In so concluding, the judge relied on the impartial physician's opinion, the testimony of the employee and the self-insurer's videotape surveillance of the employee. This videotape showed the employee walking slowly, with a slight limp, and loading light items into his car. (Dec. 643.) The judge concluded that the employee could work at least a half-time light duty job, within the impartial physician's restrictions. The judge determined that the employee had a weekly earning capacity of at least $105.00, and awarded him the maximum benefit rate available under § 35 -- 75% of his § 34 disability rate -- which translated into a $240.56 weekly earning capacity, and a weekly compensation rate of $432.94. (Dec. 644.) The judge ordered that the self-insurer pay these benefits beginning August 1998, the date the employee's § 34 benefits exhausted. (Dec. 645.)[2]

The self-insurer argues that the August 1998 date is not a date grounded in the evidence adduced at hearing upon which the judge could assign a change in the employee's incapacity status. We agree. A change in the employee's incapacity and corresponding entitlement to compensation benefits must be based on the evidence. Ortiz

[2] Under the current version of the act, an employee is generally limited to 156 weeks of § 34 benefits. G.L. c. 152, § 34, as amended by St. 1991, c. 398, § 59.

v. N.A.A.C.O., 10 Mass. Workers' Comp. Rep. 324, 327 (1996). In the present case, the administrative or statutory date of exhaustion of § 34 benefits is not such a date. See Montero v. Raytheon Corp., 11 Mass. Workers' Comp. Rep. 596, 597 (1997)(the date of receipt of a deposition transcript is an inappropriate date to determine the commencement of weekly benefits); Sullivan v. Commercial Trailer Repair, 7 Mass. Workers' Comp. Rep. 8, 9 (1993)(inappropriate to select the filing date of the decision as date to terminate weekly benefits); Castillo v. Arthur Blank & Co., 4 Mass. Workers' Comp. Rep. 110, 112 (1990)(date of conference order inappropriate date to terminate weekly benefits following a hearing). Contrast Slater v. G. Donaldson Construction, 14 Mass. Workers' Comp. Rep. 117, 123 (2000)(an employee who has been totally incapacitated since his injury must exhaust benefits under § 34 of the act before he can collect § 34A benefits).

We recommit the case for the judge to make further findings on an appropriate date, with a rational basis in the evidence, upon which the employee's § 35 benefits ought to commence.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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