COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025545-13**

Jose F. Rocha	Employee
LM Heavy Civil Construction LLC	Employer
Travelers Casualty and Surety Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Harpin)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Nicole M. McDonald, Esq., for the employee
Paul R. Ingraham, Esq., for insurer

KOZIOL, J. The employee appeals from a decision ordering the insurer to pay a closed period of § 34 temporary total incapacity benefits, from September 27, 2014 through June 19, 2015, followed by § 35 partial incapacity benefits from June 20, 2015, and continuing, at the maximum rate of $885.96, based on an average weekly wage of $2,605.04[1] and an earning capacity of $400.00 per week. (Dec. 12.) The employee raises three arguments on appeal, two of which require us to vacate the judge's decision and recommit the case for further findings of fact.

The employee worked for the employer as a "working foreman, or job boss" in "pipe-cement-concrete on large construction projects." (Dec. 5.) On October 1, 2013, he was hit by a truck on a construction site and fell into a trench, landing on the PVC piping that was lying there, injuring his left minor shoulder, left ribs and face. (Dec. 5-6.) The insurer paid the employee § 34 benefits from the date of injury through September 26, 2014, when it modified his weekly benefits to maximum partial incapacity benefits, during an extension of the payment without prejudice

[1] The employee earned in excess of the $1,181.28 state average weekly wage on the date of injury. Circular Letter 344, October 4, 2013-effective October 1, 2013.

period. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). The employee then filed the present claim seeking § 34 benefits from September 27, 2014, and continuing. The § 10A conference was held on February 25, 2015, thirteen days after the employee's second shoulder surgery. (Dec. 3.) The judge's conference order required the insurer to pay the employee § 34 benefits from September 27, 2014, and continuing. The insurer appealed. Pursuant to § 11A(2), the employee was examined by orthopedic surgeon, Dr. Hillel D. Skoff, on June 19, 2015. (Dec. 4.) Subsequently, the judge found the medical issues complex, due to "the close proximity of the [employee's] surgery to the impartial examination date." (Dec. 4.) The judge expressly allowed the parties to submit additional medical evidence for the time period following the employee's February 12, 2015, surgery, (Dec. 4), which the employee did. (Dec. 2.) The hearing was conducted on December 14, 2015, and the record closed on May 4, 2016. (Tr. 1); Rizzo, supra.

The employee claims the judge erred by terminating his total incapacity benefits as of the date of the impartial examination, June 19, 2015, because Dr. Skoff opined that the employee was totally disabled from his regular work and offered no opinion that the employee could return to the work force in June of 2015. Indeed, Dr. Skoff stated:

> He has not reached an end result with respect to treatment to date. I would expect that to be in August of this year. If the patient's clinical findings and complaints are unchanged between now and the six month mark, I would recommend either a repeat ultrasound of the shoulder or a repeat MR arthrogram, either will reveal whether his rotator cuff has once again return. [sic] The MRI is somewhat better in determining other pathology such as the labrum which cannot be seen by the ultrasound.

(Statutory Ex. 1.) In June of 2015, Dr. Smiley documented that he told the employee "there are still no absolute guarantee [sic] that this is going to heal" and that he should "continue work on his home exercises and I will see him again in 2 months." (Ex. 4.) It was not until September of 2015 that Dr. Smiley offered the physical restrictions

upon which the judge's modification order was based. (Dec. 8.) Thus, the modification order tied to June 20, 2015, was not grounded in the evidence in the record and cannot stand. Barone v. Life Care Ctr. Of W. Bridgewater, 29 Mass. Workers' Comp. Rep. 151, 154 (2015)(date of modification of benefits must be grounded in evidence showing a change in the employee's medical or vocational status).

The employee further argues the judge erred in finding he "is not in active treatment" for his left shoulder condition. (Dec. 6.) The evidence showed the employee continued treatment at the pain clinic and with Dr. Smiley. (Ex. 4.) The employee also notes the judge adopted Dr. Smiley's August 25, 2015, opinion that the employee was "not a candidate for a third surgical repair for a recurrent tear," despite the presence of more recent evidence to the contrary. (Dec. 8; Employee br. 9, 12-13; Exs. 4, 6.) Indeed, the judge adopted Dr. Skoff's opinion that "at four months post his surgery the EE's [sic] high pain level was unusual," and his recommendation that an MR arthrogram "if his symptoms persisted beyond 8/2016[2] to rule out additional rotator cuff problems." (Dec. 8.) On March 28, 2016, the employee underwent an MR Arthrogram, which "confirmed," among other things, a "focal full-thickness tear of the supraspinatus/cephalad infraspinatus tendon fibers;" a "partial thickness tear [of the] subscapularis tendon with underlying atrophic tendinopathy;" and, "AC osteoarthritis with near geyser phenomena." (Ex. 6.) Dr. Smiley's subsequent note of April 28, 2016, stated "Mr. Rocha is under my care for a problem with his left shoulder. He has an upcoming appointment with me on May 20, 2016 to discuss a possible third surgery to his left shoulder." (Ex. 4.)

The employee argues the judge's findings to the contrary are not harmless as they played a part in the judge's decision to modify his benefits. We agree. In light of the judge's errors, and without more findings of fact, we cannot determine if the

[2] The judge's reference to "8/2016," appears to be a scrivener's error. (Dec. 8.) Dr. Skoff recommended the test be performed if the employee's pain persisted at "the six month mark," which would have been August of 2015. (Statutory Ex. 1.)

judge applied proper rules of law. Praetz v. Factory Mut. Eng'g & Res., 7 Mass. Workers' Comp. Rep. 45, 47 (1993)(reviewing board must be able "to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found"). [3]

Because the modification order was not grounded in the medical evidence, and the judge made findings contrary to the evidence in the record, we vacate the judge's order modifying the employee's benefits as of June 19, 2015. We recommit the matter for further findings of fact consistent with this opinion. Pursuant to § 13A(6), the insurer shall pay the employee's attorney a fee in the amount of $1,613.55.

So ordered.

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Administrative Law Judge
Catherine Watson Koziol

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Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: ***December 9, 2016***

[3] Our concerns are bolstered by the fact that it is the state of the evidence at the close of the record that dictates the employee's burden of proof in any future proceeding. Perez v. Department of Employment and Training, 29 Mass. Workers' Comp. Rep. 133, 134-135 (2015)(in any future hearing, employee would be held to showing worsening of work-related condition following the close of the record at the prior hearing). Yet at best, this decision reads as if it is frozen in time on the date of the employee's lay testimony, nearly five months prior to the close of the evidence.