COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001777-98**

Luiza Lobo	Employee
Browning Winchester Arms Inc./U.S. Repeating Arms	Employer
Travelers Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Levine)

APPEARANCES
Robert E. Conlon, Esq., for the employee
Paul V. Mancini, Esq., for the insurer

CARROLL, J. The employee appeals the decision of an administrative judge terminating weekly temporary total incapacity benefits on the date she was last seen by her treating physician, whose opinion the judge adopted. Because the evidence credited by the judge does not support termination of benefits, we reverse and recommit the case for further findings on extent of incapacity after the last date her physician saw her.

Luiza Lobo is a fifty-four year-old native of Cape Verde, who attended school in that country only until the age of seven. She immigrated to the United States approximately two decades ago. For the nine years prior to her industrial accident, Ms. Lobo worked for the employer lifting and pushing twenty to thirty-pound chunks of metal into a machine which formed them into pieces of rifles. She performed this activity approximately 600 times per day. (Dec. 5.) Some time in 1997, she suffered her first injury to her right shoulder while opening, tightening and closing the machine. (Dec. 6.) She treated with Dr. Vanessa Britto, but did not lose any time from work. (Dec. 6-7.) On January 16, 1998, while lifting a piece of metal at work, Ms. Lobo suffered a second injury to her right shoulder, and also injured her back for the first time. (Dec. 7.) She again treated with Dr. Britto, who causally related her back and shoulder pain to the recent incident at work. (Dec. 8.) On March 10, 1998, she began treating with an

orthopedic surgeon, Dr. Stanley Leitzes, who diagnosed thoracolumbar spine strain and right shoulder tendonitis and impingement syndrome causally related to her January 16, 1998 work injury. (Dec. 8-9.) Dr. Leitzes last treated the employee on October 27, 1998, when he opined that she had reached maximum medical improvement and remained totally disabled for work. (Dec. 9.)

The insurer denied the employee's claim for compensation and, at a § 10A conference, the administrative judge awarded § 34 benefits until October 27, 1998, the date of Dr. Leitzes' last examination, and ongoing § 35 benefits thereafter. The parties cross-appealed to a de novo hearing, (Dec. 3), which was held on July 22, 1999. (Dec. 1.) Prior to the hearing, the employee was examined by Dr. John McConville, pursuant to § 11A. Finding the medical issues complex, the judge allowed the parties to submit additional medical evidence. Both Dr. McConville and Dr. Britto were deposed, and the records of the employee's treatment by Dr. Leitzes were submitted, along with the report of the insurer's examiner, Dr. Howard. (Dec. 1, 4, 9.)

In her decision, the administrative judge found that the employee's ability to use her right major arm was crucial to her work capacity as a non-English-speaking, uneducated fifty-four-year-old factory worker, and credited her complaints as to work-related pain and limitations. (Dec. 11.) She rejected the opinions of Dr. McConville, the impartial examiner, and Dr. Howard, the insurer's examiner, (Dec. 9), and adopted the opinion of Dr. Britto regarding the employee's work-related disabling conditions when examined in January 1998. (Dec. 12.) She further adopted the opinion of Dr. Leitzes that the employee was totally disabled and had reached maximum medical improvement at the time of his last examination on October 27, 1998. (Dec. 10, 12.) However, the judge found that the employee had offered no current medical evidence discussing causal relationship and extent of medical disability. (Dec. 10.) For this reason, she awarded § 34 benefits from January 19, 1998, through October 27, 1998, the last date Dr. Leitzes saw Ms. Lobo. It is the termination of benefits on this date that the employee appeals. We agree that terminating benefits on the date an adopted medical report states the employee is totally disabled, in the absence of any other credited evidence supporting

termination of benefits, is arbitrary and capricious. We therefore reverse and recommit the decision for further findings on extent of incapacity.

Factual findings as to when incapacity begins or ends must be grounded in the evidence found credible by the judge. Skalski v. Phoenix Home Life, 13 Mass. Workers' Comp. Rep. 114, 116 (1999); Montero v. Raytheon Corp., 11 Mass. Workers' Comp. Rep. 596, 597 (1997). In addition, the date chosen by the judge to terminate benefits must be based on some change in the employee's medical or vocational condition. Demeritt v. Town of North Andover School Dept., 11 Mass. Workers' Comp. Rep. 630, 633 (1997). Here, the judge adopted the opinion of Dr. Leitzes "that when he last examined the employee of [sic] October 27, 1998, he found her work related medical condition, which had been consistent throughout his treatment, rendered her totally disabled, and that she had reached a maximum medical improvement." (Dec. 10.) Dr. Leitzes' report does not evidence any improvement in the employee's medical condition, and thus cannot support a termination or reduction of benefits. Monet v. Massachusetts Respiratory Hosp., 11 Mass. Workers' Comp. Rep. 555, 560 (1997). The fact that the employee did not submit medical evidence after October 27, 1998, the date Dr. Leitzes last examined the employee, does not warrant terminating her benefits on that date in the absence of credited evidence supporting such termination. The judge credited the employee's complaints of pain, rejected the opinions of the impartial and insurance examiners, and cited no evidence, medical or vocational, which would warrant terminating temporary total incapacity benefits on October 27, 1998. By the judge's finding the employee totally incapacitated on October 27, 1998, and at maximum medical improvement, the employee has met her burden of proving work related incapacity after that date. Thus, the judge's findings ending Ms. Lobo's benefits cannot stand.

We therefore reverse the finding terminating § 34 benefits, and recommit the case to the administrative judge for further findings on the extent of the employee's incapacity after October 27, 1998. In light of the passage of time, the judge may take additional evidence as justice requires.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **April 2, 2001**
MC/jdm