COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 099823-86**

Margarette Whittaker	Employee
Massachusetts General Hospital	Employer
Partners Health Care System, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Maze-Rothstein)

APPEARANCES
Michael F. Walsh, Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the self-insurer

WILSON, J. The employee and the self-insurer appeal from a decision in which an administrative judge modified the employee's weekly benefits as of the date of the impartial examiner's deposition. Because the modification date is not grounded in the evidence, we reverse the finding and recommit the case for further findings on extent of incapacity.

Margarette Whittaker began working at Massachusetts General Hospital in 1965 as an x-ray technician. She was later trained as a CT scan technician, a position which involved frequent lifting of heavy weights, bending, twisting, stooping, pulling and pushing. (Dec. 3-4.) On February 28, 1986, while assisting other technicians in moving a patient from a stretcher to the x-ray table, Ms. Whittaker injured her back. (Dec. 4.) The self-insurer paid § 34 benefits for temporary, total incapacity from shortly after the date of injury to exhaustion on March 14, 1991. After that date, the self-insurer paid § 34A benefits for permanent and total incapacity pursuant to a 1993 decision. On April 17, 1998, the self-insurer filed a complaint seeking to modify or discontinue payment of § 34A benefits. An administrative judge denied the complaint at a § 10A conference and the case was appealed to a de novo hearing, which was held on July 19, 1999. (Dec. 2.)

Dr. James Bono, an orthopedic physician, examined the employee pursuant to

§ 11A. His report, as well as his deposition testimony taken on September 20, 1999, were admitted into evidence. The judge allowed the employee's motion to submit additional medical evidence, and the parties submitted several reports. (Dec. 1, 3.)

In his decision, the administrative judge adopted the opinion of Dr. Bono, the impartial examiner, that Ms. Whittaker could perform light work on a part-time basis, with restrictions on sitting, standing, and lifting. (Dec. 5, 7.) The judge, noting the various doctors' findings of inconsistencies on medical examinations, found the employee's testimony inconsistent in that she said she had to lie down five to six hours a day but nevertheless was able to go out and look for work. (Dec. 8.) He also was persuaded that Ms. Whittaker is intelligent and has demonstrated an ability to learn new skills. Consequently, he found that she had had an earning capacity of $100 per week beginning on September 20, 1999, the date on which Dr. Bono fully explained her ability to work at his deposition. (Dec. 8.) He thus ordered payment of § 35 partial incapacity benefits and § 35F cost of living benefits beginning September 20, 1999. (Dec. 9.)

Both parties appealed. We summarily affirm the decision except for one finding disputed by the self-insurer, which argues that the judge erred in finding that the employee had an earning capacity as of the date of Dr. Bono's deposition testimony, rather than the date of the impartial examination. We are in accord that the deposition date is an arbitrary choice for modification of benefits, but disagree that the only other date the judge could have chosen was the examination date.

It is well-established that the modification or discontinuance of weekly incapacity benefits must be based on a change in the employee's medical or vocational status that is supported by the evidence. Demeritt v. Town of North Andover School Dep't., 11 Mass. Workers' Comp. Rep. 630, 633 (1997); Parker v. Shaw's Supermarkets, 12 Mass. Workers' Comp. Rep. 6, 7 (1998). As we stated in Demeritt, supra:

> A deposition date is ordinarily not rationally related to the employee's personal condition, either medical or vocational. Typically a deposition date merely reflects the date on which two busy attorneys and one busy doctor are able to find a mutually agreeable time to meet. Therefore it is an improper date for a change in benefit level.

Id. at 633. Accordingly, we reverse the finding that the employee's earning capacity increased effective September 20, 1999.[1]

That being said, we do not concur that the employee's incapacity to work necessarily changed as of the January 5, 1999 date of the impartial examination. To be sure, we have upheld findings that the date on which the § 11A physician conducts an examination and forms an opinion indicating a change in physical condition is a sufficient evidentiary foundation upon which to base a change in weekly benefits, see, e.g., Peters v. Raytheon Company, 14 Mass. Workers' Comp. Rep. 228, 231 (2000); Betty v. Olsten Health Care, 12 Mass. Workers' Comp. Rep. 311, 313-314 (1998), even where there are other evidentiary dates that the judge might have chosen. Peters, supra at 231 n. 3. Nevertheless, we have not imposed our notion of a proper date, except in circumstances where the judge terminated or modified benefits on a date prior to the filing of a complaint for modification or discontinuance, the latter being the earliest date to which a discontinuance/modification order may be applied. See, e.g., Stowe v. M.B.T.A., 12 Mass. Workers' Comp. Rep. 458, 460 (1998); Picardi v. Bradlees, Inc., 11 Mass. Workers' Comp. Rep. 43, 44 (1997). In this case, the determination of when incapacity begins, ends or changes is a question of fact requiring the support of subsidiary findings that only the judge can make. See Parker, supra at 7 (case reversed and recommitted for findings of fact on nature and extent of incapacity during claimed period); Rossi v. Mass Water Resources Authority, 7 Mass. Workers' Comp. Rep. 101, 102 (1993) (case recommitted for judge to make subsidiary findings on date chosen to discontinue weekly benefits).

[1] Sanchez v. City of Boston, 11 Mass. Workers' Comp. Rep. 235 (1997), and Skov v. Hillhaven Harrington House & Rehab, 11 Mass. Workers' Comp. Rep. 561 (1997), in which we upheld the discontinuance of benefits on the doctors' deposition dates, are distinguishable from the instant case. In both cases, only the employee appealed, and the insurer thus conceded the incapacity period awarded. See Skov, supra at 562; and Sanchez, supra at 237. In those cases, we also found that, from the employee's perspective, there was no more advantageous date than the deposition date for termination of benefits. Because in the instant case, the insurer as well as the employee appealed, the judge is free to choose any date other than the deposition date, as long as his choice is grounded in the evidence.

We reverse the finding that the employee's earning capacity increased as of the date of the impartial examiner's deposition, and recommit the case to the administrative judge for further findings on when that change in incapacity occurred. The decision is otherwise affirmed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed:

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William A. McCarthy
Administrative Law Judge

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Susan Maze Rothstein
Administrative Law Judge