

## COMMONWEALTH OF MASSACHUSETTS

### DEPARTMENT OF INDUSTRIAL ACCIDENTS

Board No.: 024722-04

Mary Jane Doonan  
Pointe Group Health Care and Senior Center  
AIM Mutual Insurance Co.

**Employee**  
**Employer**  
**Insurer**

### REVIEWING BOARD DECISION (Judges Fabricant, Costigan and Horan)

The case was heard by Administrative Judge McManus.

### APPEARANCES

Rickie T. Weiner, Esq., for the employee at hearing and oral argument  
James N. Ellis, Esq., for the employee on brief  
George D. Kelly, Esq., for the insurer at hearing  
Paul M. Moretti, Esq. for the insurer on brief and at oral argument

**FABRICANT, J.** The parties cross-appeal from a decision awarding the employee a closed period of § 34 total incapacity benefits, followed by ongoing § 35 partial incapacity benefits. We summarily affirm the decision as to the employee's appeal, as it challenges what the insurer concedes are scrivener's errors in incapacity change dates. The insurer has acknowledged these errors, and has paid benefits in accordance with the corrections asserted by the employee. (Ins. br. 18, n. 6) However, finding merit in the insurer's argument that the judge's earning capacity findings are arbitrary and capricious, we recommit the case for further findings.

The employee broke her right ankle while working for the employer nursing home on August 8, 2004, and was provided with a splint and crutches. She started having left knee pain a week later. Although the left knee pain and swelling continued, the employee discontinued using crutches after several weeks. The employee did not return to work with the employer, but did return to teaching tap dancing at her own small business on September 22, 2004. (Dec. 6-7.)

The insurer argues that the judge's findings with respect to earning capacity are not anchored in the evidence, thus requiring recommitment. We agree.

The judge awarded § 34 benefits from the date of injury until September 22, 2004 when the employee returned to teaching tap dancing. Although a \$360 earning capacity was assigned as of that date, the judge subsequently increased the earning capacity to \$640 as of June 23, 2005, the date of the § 11A impartial physician's report.<sup>1</sup> (Dec. 20.)

The judge relied upon the impartial physician's opinion in increasing the employee's earning capacity to \$640, but also based the initial \$360 earning capacity assignment on that same impartial physician opinion, as well as the consistent disability opinion of the employee's expert physician, Dr. Guistolisi. (Dec. 11-12.) Addressing her use of the impartial physician's disability opinion for the prior period of incapacity, the judge found, "there is no compelling medical evidence that would indicate the Impartial's opinions prior to his date of exam, were not in effect." (Dec. 12.)

The error lies in the inconsistent use of the June 23, 2005 impartial disability opinion in support of both a finding of improvement in the employee's incapacity status, and the earlier, lower earning capacity. The impartial physician's disability opinion cannot accomplish both tasks. If the impartial report represents evidence of medical improvement yielding a \$640 earning capacity, it cannot also support the earlier \$360 earning capacity. Likewise, if the impartial opinion supports the earlier earning capacity assignment, then the date of the impartial report cannot

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<sup>1</sup> To the extent that a demarcation date based upon the findings of the impartial physician is required, the date of the actual examination, June 16, 2005, is the appropriate date to use and, accordingly, should be incorporated into the judge's order upon recommitment. See Jantuah v. Montachusett Opportunity Council, Inc., 10 Mass. Workers' Comp. Rep. 810 (1996); Cabral v. Aerovox, Inc., 9 Mass. Workers' Comp. Rep. 536 (1995); Palardy v. Commonwealth of Mass. DPW, 6 Mass. Workers' Comp. Rep. 165 (1992); D'Angeli v. McDonalds Restaurant, 1 Mass. Workers' Comp. Rep. 193 (1987).

**Mary Jane Doonan**  
**Board No. 024722-04**

also be the basis for the judge's increase in earning capacity. On recommittal, the judge must make further findings that resolve this inconsistency.

Accordingly, we recommit the case.

So ordered.

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Bernard W. Fabricant  
Administrative Law Judge

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Patricia A. Costigan  
Administrative Law Judge

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Mark D. Horan  
Administrative Law Judge

Filed: **February 27, 2009**