COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 044307-98 054027-98**
Peter Whalen	Employee
Mohawk Construction Co., Inc.	Employer
Phoenix Insurance Co./Travelers Property Casualty Corp.	Insurer
Bidgood Associates	Employer
Reliance Insurance Company	Insurer

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

APPEARANCES
Brian C. Cloherty, Esq., for the employee at hearing and on brief
Seth J. Elin, for the employee on brief
Sheila S. Cunningham, Esq., for Phoenix/Travelers Insurance at hearing and on brief
Edward F. McGourty, Esq., for Reliance Insurance at hearing

MCCARTHY, J., The employee, Peter Whalen, appeals a hearing decision of an administrative judge which awarded a closed period of weekly temporary total incapacity § 34 benefits and ongoing weekly partial incapacity payments pursuant to § 35. Mr. Whalen claims that the earning capacity assigned by the administrative judge is not supported by the subsidiary findings and questions the date set by the judge to establish a weekly earning capacity of $245.00.

Mr. Whalen, who was fifty-one years of age at the time of the hearing, has a high school equivalency degree. He has work experience as a carpenter, roofer, chemical mixer, laborer, welder and metal fabricator. (Dec. 4.) In 1984, he became an ironworker, a labor-intensive job requiring much reaching and bending. Id. The work involved erecting structural steel, installing steel rebar, windows and ornamental stone work, and setting and tying rebar-reinforced steel to bolster concrete. (Dec. 4-5.)

On July 17, 1998, Mr. Whalen became employed with Bidgood Associates [hereinafter "Bidgood"] on a construction job at Harvard University. On July 21, 1998, while moving rebar from a concrete pouring area, he felt pressure and a cold sensation down his neck. He became "flushed, queasy and sick to his stomach." (Dec. 5.) He also heard a grinding noise in his neck when turning his head. The incident was reported to his foreman, Charles Irving. Within a few days he experienced tightness and pressure in his right shoulder and in his right arm. This pain grew progressively worse. Id.

On August 15, 1998, the employee treated at the Norwood Hospital Emergency Room for severe right shoulder and arm pain. Id. On August 25, 1998, the employee was laid off and on September 14, 1998, he went to work with Mohawk Construction Company [hereinafter "Mohawk"]. (Dec. 6.)

On September 17, 1998, while placing a large piece of rebar on his right shoulder, the employee experienced pain in his shoulder and neck and tingling in his fingers. Id. On October 19, 1998, Whalen informed his foreman, John Willard, that he was unable to work on a wall due to pain and was assigned light duty for the rest of the day. Mr. Whalen left at the end of the day and has not worked since. Id.

A claim was filed against Travelers Insurance Company [hereinafter "Travelers"], the insurer for Mohawk. At the § 10A conference, the judge allowed the employee's motion to join Reliance Insurance Company [hereinafter "Reliance"], the insurer of Bidgood. Following the conference, the judge ordered Travelers to pay weekly benefits and denied the claim against Reliance. (Dec. 2-3.) Both Travelers and the employee appealed the conference order. (Dec. 3.)

On May 25, 1999, the employee was examined by Dr. Lawrence F. Geuss, the designated § 11A physician. Id. Doctor Guess' medical report and deposition were admitted into evidence. (Dec. 1-2.) The § 11A impartial examiner diagnosed a herniated disc at the C6-7 level on the right. He further opined that this cervical problem began while working at Bidgood, when he was lifting steel. The § 11A examiner went on to note that Mr. Whalen "got somewhat better but re-injured his neck at his second job at Mohawk . . . ." (Stat. Ex., 3; Dec. 8-9.) Finally, Dr. Guess opined that although the

employee was unable to return to his usual occupation as an ironworker he "could return to a more sedentary work but not on a full-time basis." (Dec. 9.)

Additional medical reports were allowed into evidence for the time period preceding the May 25, 1999 § 11A examination. (Dec. 10.) Medical reports of Dr. Reichard, the employee's treating physician, were submitted as was the medical report of Dr. Richard Alemian.[1] Doctor Reichard opined in reports dated December 2, 1998 and February 25, 1999 that the employee was medically disabled from returning to work as an ironworker. (Employee Ex. 2, Dec. 10.) Doctor Alemian wrote that the employee was disabled from heavy labor or any work that involved lifting, pulling, pushing or carrying more than five pounds with his right upper extremity. (Employee Ex. 4, Dec. 10.)

Based on these medical opinions and in light of the employee's vocational profile, (Dec. 4, 9-10, 12), the judge determined that the employee was " . . . totally disabled from all occupations from October 20, 1998 through December 2, 1998 and partially disabled thereafter with an earning capacity of $245.00 per week." (Dec. 10.) The judge then directed Travelers to pay the ordered benefits. All claims against Reliance, as the insurer of Bidgood, were denied and dismissed. (Dec. 14.)

The employee asserts on appeal that the assigned earning capacity is not adequately supported by the subsidiary findings. We disagree and summarily affirm on this issue. See Mulcahy's Case, 26 Mass. App. Ct. 1 (1988). In addition, the employee maintains that December 2, 1998, the date used to modify § 34 benefits is not supported by the record. We agree. The date, December 2, 1998, is only significant because it is the date of Dr. Reichard's first report. From the injury date through the December 2 report, the judge awarded total incapacity benefits on the same medical evidence. There is nothing in that writing to suggest a change in the medical condition on that date. (Employee Ex. 3.) Moreover, in his later report dated February 25, 1999, Dr. Reichard opined that the employee was still totally disabled from returning to work as an ironworker. (Employee's Ex. 2; Dec. 10.)

[1] Doctor Richard Alemian examined the employee on February 23, 1999 on behalf of Travelers Insurance Company. (Dec. 10.)

The employee correctly states that " 'modification . . . of weekly incapacity benefits must be based on a change in the employee's medical or vocational status which appears in the record evidence.' " (Employee's brief, 8)(quoting Lavoie v. Zayre Corp., 13 Mass. Workers' Comp. Rep. 76, 79 (1999)). Here the judge used December 2, 1998 without any explanation as to why this date was chosen to establish an earning capacity.[2] (Dec. 12.) Nothing of evidentiary significance occurred on December 2, 1998 which would support the award of an earning capacity on December 3, 1998.

We therefore recommit the case to the administrative judge to re-examine and make additional findings as to the date chosen to end § 34 benefits. In all other respects, the decision of the administrative judge is affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **April 19, 2002**

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Sara Holmes Wilson
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

[2] Indeed, the use of February 2, 1998 could be a clerical error because earlier in his decision, the judge found that, " . . . Mr. Whalen was capable of returning to part-time, entry-level, sedentary work as of May 25, 1999, the date of Dr. Guess' impartial examination." (Dec. 10.)