COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 053224-00**
Ronald J. Corbitt, Jr.	Employee
Modern Continental Construction Co.	Employer
National Union Fire Insurance Co.	Insurer

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

APPEARANCES
Francis J. Hurley, Esq., for the employee
Mark H. Likoff, Esq., for the insurer

MCCARTHY, J. The employee appeals a decision of an administrative judge in which he was awarded a closed period of weekly G. L. c. 152, § 35, weekly partial incapacity benefits and a closed period of § 34 temporary total incapacity benefits. After a review of the evidentiary record, we affirm the decision.

Ronald J. Corbitt, Jr., was a thirty-five year old, married, father of two minor children at the time of the administrative judge's decision. He is a high school graduate with a diverse employment background. His prior experience includes work as a merchant marine, a car cleaner for Amtrak, a street sweeper operator, and a package sorter and delivery person for Federal Express. Additionally, Mr. Corbitt had taken construction jobs through Local # 33 of the Carpenters Union and Local #223 of the Laborers International Union. (Dec. 4.)

In September of 2000, Mr. Corbitt began employment with Modern Continental Construction Company as a construction laborer. He operated a pneumatic hammer/drill and frequently carried such items as forms, aluminum beams, sandbags, tools and hoses.

The employee was also required to remove rubble from jobsites. Mr. Corbitt commonly lifted items weighing 100 to 150 pounds. (Dec. 4.)

On Friday, November 24, 2000, the employee, in the course of his work, was carrying five-gallon buckets of concrete, each weighing fifty to sixty pounds. At some point, he experienced a pulling or tearing sensation in his left arm. He reported the problem to a foreman and then continued to work the balance of the workday. His pain continued over the weekend and upon returning to work on Monday, his employer sent him to a clinic at Logan Airport. "Though put on light duty, he was given much the same work as was his usual assignment." (Dec. 5.) He began to compensate for his left arm pain by using his right arm. In early January 2001, upon the advice of his physician, the employee discontinued work and was placed on weekly incapacity benefits by the insurer. Id.

The employee continued to experience pain in both arms despite cortisone injections. He had difficulty performing even the simplest daily tasks such as picking up a gallon of milk or carrying a trash bag. On January 22, 2002, more than a year after stopping work, the employee underwent elbow surgery. For a period of time following the surgery, he had trouble opening and closing his left hand. Notwithstanding physical therapy and treatment by numerous medical professionals, the employee continues to experience pain in both arms. (Dec. 5.)

The insurer paid § 34 weekly temporary total incapacity benefits from January 9, 2001 to September 17, 2001 and § 35 weekly partial incapacity benefits from September 18, 2001 and continuing. The employee filed a claim seeking § 34 benefits from September 18, 2001 onward. Following a § 10A conference, § 34 benefits were restored, effective January 22, 2002 the date of his surgery. Both parties appealed and the case was returned to the same administrative judge for a hearing de novo. (Dec. 2.)

On August 6, 2002, the employee was examined by Dr. Jeffrey L. Zilberfarb, the § 11A impartial medical examiner. (Dec. 5.) Doctor Zilberfarb diagnosed chronic bilateral epicondylitis, status post left elbow surgical release. On examination he noted few objective signs of continuing problems. The medical expert opined that the

employee was capable of light duty work. He anticipated that the employee would be able to return to his prior activities as a laborer after a work hardening program. (Dec. 6.) The report was entered into the evidentiary record. Neither party opted to depose the medical expert. (Dec. 1, 3.) Additional medical evidence was admitted to address the period of time from the start of the claimed period until the date of the impartial examination. (Dec. 3.)

Rosalyn Davidoff, a vocational specialist, testified that the employee was capable of light duty employment. She indicated that the employee could earn $9.00 to $11.00 per hour as either a security guard or a driver. (Dec. 8-9.) Additionally, Mark Ross, a licensed private investigator, testified as to his surveillance of Mr. Corbitt. Mr. Ross testified that the employee routinely left his house just prior to 7:00 am, picked up another male at East 8th Street and drove to 40 Knollwood Road, Quincy, Massachusetts. He stated that the two men would spend a considerable amount of time at the location on each visit. (Dec. 9-10.) The investigator also stated that a large dumpster was located on the premises and a building permit was displayed in the window. Further investigation at the Quincy building department revealed that the permit was issued to perform repair work to a rear deck and to re-sheetrock a bedroom. (Dec. 9.)

The employee testified that he did frequent the Quincy site as it was the home of a friend. He stated that he was at the site to enjoy the view of the beach, the surround sound DVD system and the in-home bar. Although he acknowledged that work was occurring at the location, the employee denied any involvement or compensation for his presence. (Dec. 10.)

Finding the employee less than credible, and crediting instead the investigator's testimony, the administrative judge determined that the employee did possess the ability to earn his full wages. However, without direct evidence that the employee did in fact earn wages, the judge denied the insurer's request for § 14 penalties. (Dec. 11-12.) Accordingly, the administrative judge ordered the insurer to pay § 35 partial incapacity benefits through January 21, 2002, after which the employee had surgery and § 34 temporary total incapacity benefits from January 22, 2002 through July 14, 2002. The

judge determined that the employee failed to prove any incapacity beginning July 15, 2002 when he was first observed leaving his house for what turned out to be regular trips to 44 Knollwood Road. (Dec. 13, 16.) We have the case on appeal by the employee.

First the employee contends that the administrative judge erred in rejecting the § 11A medical opinion. The employee argues that the judge's rejection of Dr. Zilberfarb's opinion was based on unreasonable inferences he drew from the testimony of the private investigator. We disagree. After recounting the investigator's observations and the employee's explanation, as discussed above, the judge found:

> It is beyond credulity for me to think that Ronald Corbitt and another person would be up and out of the house at the crack of dawn, morning after morning, to go to a house with a construction project going on, not to work, but merely to watch DVDs and look at the harbor. The utter unbelievability of this leads [ ] me to be unable to trust Mr. Corbitt's testimony as to his ongoing symptoms and as to his inability to engage in activity. It also leads me to not be able to fully trust what he stated about those things to the impartial physician and to other medical providers and examiners.
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> . . . While I clearly do not believe the employee's explanation and I am left with very strong suspicions that what the insurer suggests about Mr. Corbitt's activities may be true, I do not have any actual evidence of earnings by Mr. Corbitt. Nor do I have any evidence or eyewitness testimony of Mr. Corbitt actually performing work.
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> The evidence here, with the inferences that can be drawn from that evidence, is sufficient to cause me to not believe Mr. Corbitt's testimony that he is totally disabled. However, I do not see it as sufficient for me to go so far as to affirmatively find that he is working. . . . Therefore, while I find Mr. Corbitt wanting in the meeting of his burden to establish an incapacity to earn and an entitlement to weekly benefits after a certain point, I also find that the insurer has not fully met its burden to establish the facts necessary to support its counterclaim under § 14.

(Dec. 11-12.) Thus, the judge did not infer that the employee was actually working from his testimony and that of the investigator, but rather that he was not a credible witness when he claimed to be totally incapacitated. This inference is totally reasonable. Compare Miranda v. Atlantic Paper Box Co., 12 Mass. Workers' Comp. Rep. 510 (1998)

(inference that employee was working was not reasonable where based on evidence that employee has not applied for SSDI, welfare or other forms of assistance and has gotten by on § 35 benefits plus a series of loans from someone to whom she owed a lot of money).

The judge then went on to reject Dr. Zilberfarb's opinion that, at the time of his examination August 6, 2002, the employee was capable of only light duty work. Dr. Zilberfarb had reached this conclusion though he opined that the employee had few, if any, objective signs of continuing problems in his left elbow. (Dec. 6.) It is, of course, true that the judge may not reject the impartial expert's prima facie opinion without a rational basis for doing so. Shand v. Lenox Hotel, 14 Mass. Workers' Comp. Rep. 152, 154-155 (2000). Such a rational basis exists where the impartial opinion is based on facts not found by the judge. See Burke v. Burns & Roe Enterprises, 15 Mass. Workers' Cop. Rep. 332, 340 (2001); Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282 (1999). "Provided his credibility assessment is not arbitrary or capricious, see Melendez v. City of Lawrence, 16 Mass. Workers' Comp. Rep. 370, 374 (2002), a judge's disbelief of an employee's testimony about. . . his complaints of pain and physical restrictions, can trump an expert medical opinion of . . . disability . . . ." Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 319 (2003). As discussed above, the judge's credibility assessment was eminently reasonable and well articulated:

> I read the Zilberfarb [§ 11A] opinion (that there was some remaining partial incapacity and that the release of the employee for regular work was some two to three months off) as having been based upon the employee's subjective complaints of pain and the employee's statement of not having improved as a result of the surgery. *As I do not give any credit to those complaints or that part of the employee's history*, I must reject the impartial physician's opinion of even that limited disability as it relied upon those untrustable [sic] complaints and that untrustable [sic] history.

(Dec. 13-14.) (Emphasis added.) Accordingly, we find no error in the judge's rejection of the impartial physician's opinion that the employee could only do light duty work.[1]

Next, the employee contends that the judge erred in not performing a Scheffler analysis in determining whether to award the employee § 34 or § 35 benefits from September 18, 2001 (when the insurer reduced the employee's benefits from § 34 to § 35) to January 21, 2002 (when the employee had surgery). Id. We disagree and summarily affirm the judge's finding of an earning capacity of $150.00 to 200.00 per week during this closed period of some four months.

Finally, the employee contends that the July 15, 2002 date has no evidentiary significance and therefore it was error for the judge to discontinue benefits as of that date. Again, we disagree. "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." Whittaker v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 243, 245 (2001). Here, the judge based his modification of the employee's benefits on a change in both the medical and vocational capacity of the employee:

> Beginning as of the January 22, 2002 surgery date, I find the employee to have become totally incapacitated from gainful employment as a result of his having undergone surgery and needing a period of time post-surgery for recovery and rehabilitation. In making that finding, I adopt the opinion of Dr. Rosen that the employee would have been totally disabled after the surgery, first through March 2002 and then find that total incapacity continuing longer while there was an exploration of the continued complaints.
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> However, I find that period of recovery and rehabilitation to have largely ended as of Monday, July 15, 2002, the first day that Mr. Corbitt was specifically observed to be leaving his house before 7:00 a.m. on what turned out to be his regular mission to 44 Knollwood Road in Squantum. To whatever extent I can trust his explanation of his condition at earlier times, as to that which was said of those things for July 15, 2002 and dates thereafter, I am not able to trust Mr. Corbitt's

[1] Moreover, we note that the impartial examiner's opinion that the employee is capable of light duty work is not strictly a medical opinion entitled to prima facie weight. See Scheffler's Case, 414 Mass. 251, (1994) (administrative judge not required to accord prima facie weight to § 11A doctor's non medical opinions).

> description of the extent of his symptoms, his physical limitations and his purported inability to engage in activity. Because I cannot trust and cannot find as accurate that which Mr. Corbitt said in description of himself for July 15, 2002 and thereafter, both to me and to medical experts who relied on that information in developing their opinions, I find there to not be any reliable lay or expert evidence that would establish disability and/or incapacity July 15, 2002 and thereafter.

(Dec. 13.) Accordingly, we affirm the judge's decision to modify the employee's benefits as of July 15, 2002. Compare Demeritt v. Town of North Andover School Dept., 11 Mass. Workers' Comp. Rep. 630, 633 (1997)(deposition date is not ordinarily related to employee's medical or vocational condition); Parker v. Shaw's Supermarkets, Inc., 12 Mass. Workers' Comp. Rep. 6, 7 (1998)(date of final proceeding in case is not related to change in employee's medical or vocational condition).

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William A. McCarthy
Administrative Law Judge

Filed: **December 9, 2003**

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge