

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 026047-03**

Sean Bennett  
Modern Continental Construction  
National Union Fire Insurance

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Fabricant, McCarthy and Horan)

**APPEARANCES**

Teresa Brooks Benoit, Esq., for the employee at hearing  
John J. King, Esq., for the employee at deposition  
Seth J. Elin, Esq., for the employee on appeal  
Michael P. McCoy, Esq., for the insurer at hearing and on appeal  
Mark Sullivan, Esq., for the insurer at deposition

**FABRICANT, J.** The employee appeals from an administrative judge's decision awarding him a closed period of weekly temporary total incapacity benefits and ongoing partial incapacity benefits. The employee challenges his assigned earning capacity, and the date of modification from total to partial incapacity benefits. We affirm the decision.

At the time of hearing, the employee was a twenty-nine year-old high school graduate who had worked almost exclusively as a laborer in the construction industry. (Dec 3; Tr. 9, 27.) On September 3, 2003, while working, he felt something pop in his left scapular joint. He began treating the next day, and has not returned to work. (Dec. 3-4.) The insurer accepted liability for the employee's injury, but terminated § 34 benefits after a little over one month. Following a § 10A conference order award, the insurer appealed to a hearing, disputing incapacity, ongoing causal relationship and the need for shoulder surgery.

The § 11A examiner opined that the employee had no discernible disability or limitations. (Dec. 5.) The judge allowed the parties to submit additional medical evidence. (Dec. 1-2.)

The employee submitted the office notes of several treating physicians, including Dr. Robert L. Patz, with whom he treated from September 5, 2003 through January 21, 2004. (Dec. 1, 7.) Dr. Patz “took the employee out of work until January 1, 2004 and ordered diagnostic testing and physical therapy.”<sup>1</sup> (Dec. 7.)

The judge rejected the § 11A examiner’s opinion and adopted the employee’s treating physicians’ opinions. (Dec. 8.) The employee testified that, though his activities are limited due to persistent pain, he has requested light duty from his employer and “would take it” if offered. (Dec. 4-5; Tr. 23.) The judge credited the employee’s testimony in its entirety. (Dec. 5.) With respect to disability, the judge concluded:

Medical evidence has been presented indicating that the employee was temporarily totally disabled from the date of his injury to January 1, 2004. There is no supportive evidence to warrant a finding of total disability following that date.

(Dec. 9.) Accordingly, he awarded the employee § 34 benefits until January 1, 2004, and § 35 benefits thereafter. In addition, he found the proposed shoulder surgery reasonable and necessary.

In determining the employee had the capacity to earn \$400 per week beginning on January 2, 2004, the judge noted that, although the majority of the employee’s work experience was laborious, he had training as an emergency medical technician and loan processor. (Dec. 9-10.)

On appeal, the employee maintains that the \$400 earning capacity assigned by the judge was arbitrary and capricious. We summarily affirm the decision as to that issue. See Mulcahey’s Case, 26 Mass. App. Ct. 1 (1988)(in the absence of testimony as to the earning capacity of the employee, a judge may use his own judgment and knowledge); cf. Dalbec’s Case, 69 Mass. App. Ct. 306 (2007)(monetary figure may not emerge from thin air; judge must explain source and application of earning capacity where a particular job is identified as the sole source of such capacity).

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<sup>1</sup> On October 29, 2003, Dr Patz wrote: “No work until Sean has seen me and a follow up appointment.” On November 21, 2003, he wrote: “No work 11/21/03 – 1/1/04.” (Employee Ex. 2.)

The employee also argues that the judge did not explain, nor does the evidence support, the January 2, 2004 modification date. We disagree. We have consistently held 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. Foreman v. Highway. Safety Sys., 19 Mass. Workers' Comp. Rep. 193, 196 (2006); Corbitt v. Modern Continental Constr. Co., 17 Mass. Workers' Comp. Rep. 557, 562-563 (2003); Whalen v. Mohawk Constr. Co., Inc., 16 Mass. Workers' Comp. Rep. 156, 159 (2002); Demeritt v. Town of North Andover School Dept., 11 Mass. Workers' Comp. Rep. 630, 633 (1997). Here, the decision to reduce the employee's benefits on January 2, 2004 is supported in the evidence by Dr. Patz's note indicating that the employee should not work through January 1, 2004, and the absence of any subsequent medical opinion of a total medical disability. (See Dec. 7.) This is more than sufficient evidentiary support for the modification date used by the judge.

The employee's assertion that another treating physician, Dr. Warner, provided evidence of a continuing total disability is unfounded. Dr. Warner never opined the employee was totally disabled. Rather, he opined only that the employee was disabled from his job as a construction worker, and placed restrictions on repetitive, forceful use of his left shoulder. (Ex. 2, January 2, 2006 report of Dr. Warner.) Moreover, the employee himself testified that he had sought, and would accept, light duty work. Finally, contrary to the employee's argument, the judge's finding that the employee needed surgery did not, without more, mandate a finding of total incapacity.

It is the employee's burden to prove every element of his claim, including the extent and duration of incapacity. Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 322 (2003). Given the facts found by the judge, which were clearly supported by the evidence, it was not arbitrary and capricious for the judge to conclude the employee had not met his burden of proving total incapacity after January 1, 2004. Therefore, we affirm the decision.

**Sean Bennett**  
**Board No. 026047-03**

So ordered.

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Bernard W. Fabricant  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

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Mark D. Horan  
Administrative Law Judge

Filed: **November 13, 2007**