COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.** 009078-01

Susan Sacco	Employee
Lane Bryant	Employer
Hartford Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Horan and Fabricant)

APPEARANCES

Paul V. Shannon, Esq., for the employee
Christine M. Harding, Esq., for the insurer

McCARTHY, J. This case is before us on cross-appeals. We summarily affirm the decision of the administrative judge with respect to the employee's appeal of the denial of her claim for weekly permanent and total incapacity benefits under § 34A of the Act. In its appeal, the insurer raises a single issue. It argues that the administrative judge's use of the February 6, 2004 statutory exhaustion date of the employee's § 34 benefits as the inception date for the award of partial incapacity benefits under § 35 is not grounded in the evidence and, therefore, wrong as a matter of law. We disagree.

Susan Sacco, a forty-seven year old, married manager of the employer's retail store, fell from a sixteen foot ladder on February 5, 2001 while attempting to change a fluorescent light tube. (Dec. 5.) She landed directly on her left shoulder and severely fractured it. She underwent surgery the following day. Id. The insurer accepted Mrs. Sacco's claim and paid weekly total incapacity benefits under § 34 from February 5, 2001 until the statutory maximum was reached on February 5, 2004. The insurer then voluntarily began payment of § 35 partial incapacity benefits at a weekly amount equal to seventy-five percent of the employee's § 34 weekly entitlement, i.e., $390.66, which is seventy-five percent of the average weekly wage of $868.14

Although the insurer accepted the case and paid weekly benefits as outlined above, a dispute arose with respect to the payment of certain medical expenses. A claim for payment of these medical bills was filed and it came on for a conference under § 10 of the Act on March 27, 2003. On April 9, 2004, the judge denied the claim for payment of

these bills. The employee appealed and the case went back to the same administrative judge for hearing de novo on May 20, 2004. As the exhaustion of weekly § 34 benefits loomed into sight, the employee filed a motion to join a claim for permanent and total incapacity benefits under § 34A of the Act. The judge allowed this motion. Then, on August 11, 2003, the insurer filed a complaint to terminate or modify weekly benefits. The insurer moved to join this complaint to the pending issues for hearing and the motion was allowed.

Dr. Daniel Tanenbaum performed a § 11A exam on June 9, 2003 and made the following diagnoses: "Comminuted fracture of the left humeral head, status post hemiarthroplasty with good bony healing, adhesive capsulitus of the left shoulder, chronic mild overuse tendonitis of the right shoulder, myofascial pain of the cervical spine and parascapular muscles, non-specific headache syndrome." He opined that the employee has a permanent partial medical disability, should avoid repetitive activities with both upper extremities and should not work above waist level with her left arm. (Dec. 6.)

The § 11A examiner was deposed on July 7, 2004 and held to his opinion regarding the employee's work restrictions. (Dep. 27, 41-42.) The judge adopted the medical opinion of Dr. Tanenbaum, as well as that of Dr. Michael Rater, a psychiatrist, whose report dated March 15, 2004 was introduced into evidence by the insurer. [1] Dr. Rater diagnosed chronic post-traumatic stress disorder and depressive disorder with a partial psychiatric disability causally related to the accepted physical injury. (Dec. 7.)

The judge determined that Mrs. Sacco had an earning capacity based on her prior work in a managerial capacity, her relatively young age, her education and the variety of her prior jobs. He set her earning capacity at $220.00 per week, with weekly § 35 payments of $388.88 to begin February 6, 2004, the day after the exhaustion of her § 34 benefits.

We agree with the general proposition advanced by the insurer that findings without evidentiary support cannot stand. Sanchez v. City of Boston, 11 Mass. Workers' Comp. Rep. 235, 236 (1997), citing Palermo v. Worcester State Hosp., 9 Mass. Workers' Comp. Rep. 665, 666 (1995). A purely procedural date, without other significance, is unsupportable as a date to begin, end or otherwise alter weekly benefits. See, e.g.,

[1] The parties were granted permission to submit further medical evidence relevant to the claim of psychiatric injury and the § 11A physician's report was found to be adequate with respect to the physical injury. (Dec. 3-4.)

Sullivan v. Commercial Trailer Repair, 7 Mass. Workers' Comp. Rep. 8 (1993) (utilization of the decision filing date to terminate benefits improper); Rossi v. Mass. Water Resources Auth., 7 Mass. Workers' Comp. Rep. 101 (1993)(inappropriate to terminate benefits as of the hearing date without subsidiary findings explaining why that date would be proper). The date utilized by the administrative judge to terminate or otherwise adjust benefits must be grounded in supporting record evidence. Sanchez, supra.

The insurer filed a complaint to terminate or modify weekly benefits on August 11, 2003. The June 9, 2003 exam and report of the § 11A examiner, finding a permanent partial medical disability, was adopted by the judge with respect to the physical injury. (Dec. 3.) The psychiatric report adopted by the judge was the March 15, 2004 report of Dr. Michael Rater, which supported a finding of partial emotional incapacity at the time of his March 15, 2004 examination. (Dec. 7.) [2]

As we held in Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354, 356 (1995), and reaffirmed in Picardi v. Bradlees, Inc., 11 Mass. Workers' Comp. Rep. 43, 44 (1997), the earliest date to which a discontinuance or modification order may be applied is the date on which the insurer filed the complaint. Stowe v. M.B.T.A., 12 Mass. Workers' Comp. Rep. 458 (1998). The filing date of the insurer's complaint to modify benefits is of no consequence here because the last piece of evidence adopted by the judge as he confronted the question of medical disability and incapacity was the March 15, 2004 psychiatric report of Dr. Rater. It is clear that the opinion rendered by Dr. Rater is not limited to the conditions found on the day of the exam and thereafter. It also looks back well before the February 6, 2004 date used by the judge to begin the award of § 35 benefits.

As there is evidence on the record which supports the February 6, 2004 starting date for § 35 partial incapacity benefits, we reject the insurer's appeal and affirm the judge's decision. The insurer is directed to pay employee's counsel a fee of $1,357.64 under the provisions of c. 152, § 13A(6).

[2] The employee offered into evidence the medical reports of Amy Prince, M.D., and Wendy Sohne, Lic. S.W. The judge opted not to address these reports in his decision. (Dec. 3.) See Yackolow v. City of Lynn School Dept., 17 Mass. Workers' Comp. Rep. 618, 620 (2003)(judge is free to adopt medical evidence that he considers persuasive, the quantity and quality of countervailing medical opinions notwithstanding).

So ordered.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: March 22, 2006