

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

**BOARD NOS. 041636-20
012150-21**

William Travis
Allsafe Scaffold
New York Marine and General Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Fabiszewski)

The case was heard by Administrative Judge Bean.

APPEARANCES
Kenneth J. Butterworth, Esq., for the employee
Teri A. McHugh, Jr., Esq., for the insurer

FABRICANT, J. The insurer appeals from the administrative judge’s decision finding the employee totally disabled from April 15, 2021, to the present and continuing, and awarding benefits pursuant to §§ 34, 13 and 30. The insurer contends that finding the employee totally disabled beyond July 5, 2023, is not supported by the evidence. We disagree and affirm the decision of the administrative judge.

The employee is a 49 year old union carpenter, who has been a member of the United Brotherhood of Carpenters & Joiners Local 118 in New Hampshire since 2017. In June 2019, he started work for the employer, AllSafe Scaffolding Company, and worked through the winter of 2019-2020, working 12 months a year for his first 15 months on the job.

On July 9, 2020, he had his first work accident, resulting in a dislocation injury to his right shoulder and a labral tear to his left shoulder. During a brief hospital visit following the accident, the employee had x-rays taken, and his shoulder was “popped back” into place, but he did not complain about the mild, burning pain he was experiencing in his left shoulder at that time. (Dec. 27.)

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Shortly after leaving the hospital, the employee reported his dislocation injury to the employer, but again neglected to mention his left shoulder complaints. The employer allowed him to collect unemployment compensation while he was out, and the employee returned to full duty work on July 27, 2020, just 18 days after the accident. He was sore, but could do the work, although the pain in his left shoulder continued to get worse. (Dec. 28.) He was unexpectedly laid off on September 25, 2020, but says he could have otherwise continued to work. (Dec. 28.) Indeed, he received unemployment compensation from September 26, 2020, to April 7, 2021. (Dec. 27.)

In March 2021, the employee underwent an MRI and received an injection for his left shoulder. Surgery was recommended. (Dec. 28.)

The employee returned to work on April 7, 2021, and worked full time until April 14, 2021, when he dislocated his right shoulder again. Following a hospital visit where his shoulder was, once again, “popped back in,” he communicated with his employer that he was advised not to return to work for 4 to 6 weeks. He continued to seek treatment throughout 2021, and finally underwent right shoulder surgery in January 2022. On December 7, 2022, he underwent left shoulder surgery on his labrum and rotator cuff. (Dec. 29.)

The judge found the employee currently can lift only 12-13 pounds with his right arm but has good motion with it. Using his left arm, he can lift 20 pounds. As of the date of the hearing, the employee was still in physical therapy for his left shoulder. He also iced and applied heat to both shoulders. The judge credited the employee’s testimony and found the employee did not believe that he could return to his prior work, and that he would like to be retrained. (Dec. 29, 32; Tr. 118-120.)

In conjunction with the employee’s credible testimony, the judge also relied on the medical opinions of the employee’s treating physician, Alan S. Curtis, M.D., the employee’s consulting physician, George Kasparyan, M.D., impartial physician Ralph R. Wolf, M.D., and the insurer’s consulting physician, Christopher B. Geary, M.D.. (Dec. 32.) All the credited medical evidence consistently supports the judge’s findings related to the relevant issues of causal relationship, diagnosis and treatment of the claimed

injuries. Additionally, we discern no relevant inconsistencies between the credited testimony of the employee with the credited medical evidence.

The entire basis for the insurer's appeal appears to be the May 25, 2023, deposition testimony of Dr. Curtis (Ex. 30) cited by the judge:

The employee could probably do light duty work in six weeks (July 6, 2023 counting 42 days from the May 25, 2023 deposition). Page 48, line 18, page 54, line 15. A return to scaffolding work is "possible but not definite[.]" Page 49, line 5. He may be able to lift 50 pounds a year after his most recent surgery. After a year post surgery (December 2023) "he's going to be as good as he's going to get[.]" Page 49, line 9, see also page 51, line 17, page 54, line 19. It is possible but unlikely that the employee could someday lift 30 pounds overhead. Page 54, line 22.

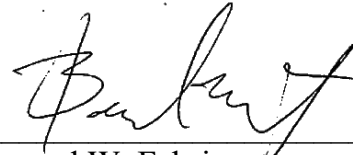
(Dec. 30.)

It is clear from the language used by Dr. Curtis that these are only speculative future predictions of what the state of the employee's medical condition might become. The judge is under no obligation to adopt speculative opinions. LaFleur v. M.C.I. Shirley, 24 Mass. Workers' Comp. Rep. 301, 306 (2010)(A medical opinion which "predicts" a cessation of disability is speculative, and does not support a discontinuance of benefits. See Gallo v. Angel Enterprises, 9 Mass. Workers' Comp. Rep. 453, 455 [1995]). While the judge recited Dr. Curtis's speculative testimony, he clearly did not adopt it, and we conclude that the judge's parenthetical calculation of July 6, 2023, as the date of the predicted improvement was intended, not as a cutoff date for disability benefits, but simply as a contextual marker to show the speculative nature of the doctor's "six weeks" testimony.

We find that the judge addressed the issues in an appropriate and discerning manner, and that his decision is adequately supported by the evidence presented. Accordingly, the decision of the administrative judge is affirmed. The insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of \$1,866.87, plus necessary expenses.

So ordered.

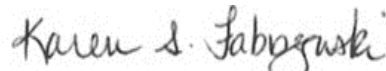
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Bernard W. Fabricant
Administrative Law Judge



Catherine Watson Koziol
Administrative Law Judge



Karen S. Fabiszewski
Administrative Law Judge

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