COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018715-05**

Dorothy Asare	Employee
City of Taunton Nursing Home	Employer
City of Taunton	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, McCarthy and Costigan)

The case was heard by Administrative Judge McManus.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing and on appeal
James N. Ellis, Esq., for the employee on appeal
Salvatore J. Perra, Esq., for the self-insurer

KOZIOL, J. The employee appeals from a decision denying and dismissing her claim for reinstatement of weekly incapacity benefits under § 34 and/or § 35. The employee contends the self-insurer twice acted illegally: first, when it failed to resume payment of § 34 total incapacity benefits, in alleged violation of § 8(2)(c),[1] and second, when it later terminated payment of § 35

[1] General Laws c. 152, § 8(2)(c), provides, in pertinent part:

> (2) An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situation:
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> > (c) the employee has returned to work; provided, however, that the insurer shall forthwith resume payments if, within twenty-eight calendar days of return to such employment, the employee leaves such employment and, within twenty-one calendar days thereafter, informs the employer and insurer by certified letter that the disability resulting from the injury renders him incapable of performing such work; provided, further, that if due, compensation shall be paid under section thirty-five. . . .

partial incapacity benefits, in alleged violation of § 8(2)(d).[2] We affirm the decision.

Both claims of illegal action by the self-insurer were submitted to the judge on an agreed statement of facts, accompanied by supporting documents and the employee's testimony. (Dec. 1-3; Exs. 4A-J.) We summarize the pertinent facts.

On June 1, 2005, the employee, a certified nursing assistant (CNA), sustained an injury that arose out of and in the course of her employment for the employer.[3] (Dec. 2; Ex. 4 par. 1.) On that date, the employee also held a second job as a personal care attendant employed by Cerebral Palsy Massachusetts, Inc. As a result, the self-insurer paid the employee § 34 benefits based on her concurrent wages from both employers. (Dec. 3; Ex. 4 par. 3.)

The employee's job as a CNA required heavy lifting and patient care including "bathing patients, transferring them in and out of bed and to the bathroom, feeding them and assisting them in their movement about the facility." (Dec. 3.) The employee's concurrent employment as a personal care attendant required her to perform heavy lifting for one disabled individual whom she assisted with "his personal hygiene and breakfast" and for whom she performed

[2] General Laws c. 152, § 8(2)(d), provides, in pertinent part:

> (2) An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situation:
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> > (d) the insurer has possession of (i) a medical report from the treating physician, or, if an impartial medical examiner has made a report pursuant to section eleven A . . ., the report of such examiner, and either of such reports indicates that the employee is capable of return to the job held at the time of injury or other suitable job pursuant to section thirty-five D consistent with the employee's physical and mental condition as reported by said physician and (ii) a written report from the person employing said employee at the time of the injury indicating that such a suitable job is open and has been made available, and remains open to the employee; provided, however, that if due, compensation shall be paid under section thirty-five. . . .

[3] The employee testified the injury was to her neck, (Tr. 16), whereas the parties' joint statement of material facts indicates the injury was to her back. (Ex. 4, par. 1.)

laundry and house cleaning duties. (Dec. 3.) The employee testified the physical requirements of both jobs were about the same. (Tr. 13.)

On April 27, 2006, a job offer by the City of Taunton was extended to the employee after her treating physician released her to return to light duty work based on the employer's written job description of a "feeder." [4] (Dec. 4.) On May 23, 2006, the employee returned to work for the employer performing that light duty job. (Dec. 4.) When the employee returned to work, the self-insurer modified her weekly benefits and began paying § 35 benefits based on the actual wages she earned in the light duty job and her concurrent pre-injury average weekly wage. (Dec. 4.) The employee performed the light duty job until June 6, 2006. (Ex. 4, par. 6.) On June 13, 2006, the employee hand-delivered to her employer, a note simply stating, "I would like to let you know that, I can no longer do the light duty that was given to me." (Dec. 4; Ex. 4E.) On October 1, 2006, the self-insurer terminated the employee's weekly § 35 benefits after receiving a September 20, 2006, note from the employee's treating physician, Dr. Christopher Bono, who reviewed a job description of the employer's CNA position and opined the employee could return to full-time work performing the CNA job. (Ex. 4, par. 9; 4F and 4G.)

At the hearing, the employee advanced two discrete arguments in support of her claim. First, the employee contended she complied with the requirements of § 8(2)(c) when she gave the employer the note on June 13, 2006, and therefore the self-insurer acted illegally when it failed to reinstate her § 34 benefits retroactive to June 7, 2006. (Tr. 6.) Second, the employee argued Dr. Bono's note of September 20, 2006, which mentioned only the employee's ability to perform her CNA job, did not satisfy the requirements of § 8(2)(d) because it failed to address her ability to perform her concurrent employment as a personal

[4] On May 15, 2006, the employee responded in writing to the written job offer, asking for additional time to get her affairs in order prior to returning to work and informing the employer she was sending a copy of its April 27, 2006 letter to her lawyer for review. (Exs. 4, par. 1 and 4D.)

care attendant. (Tr. 6-7.) Thus, the employee asserted, the self-insurer acted illegally when it terminated all of her weekly incapacity benefits on October 1, 2006. (Id.)

The judge found the note the employee gave the employer on June 13, 2006 did not satisfy the requirements of § 8(2)(c) because "it was not provided by certified mail" and it "did not indicate that it was the disability resulting from the injury, that 'rendered her incapable' of continuing in the light duty position." (Dec. 8.) Because the employee had failed to comply with the requirements of § 8(2)(c), the judge concluded the self-insurer was not required to reinstate the employee's § 34 benefits, which it had paid prior to her return to work. (Dec. 9.)

In regard to the self-insurer's subsequent termination of the employee's § 35 benefits on October 1, 2006, the judge found:

> It is clear from the stipulated facts that the Employee's treating physician, Dr. Bono, did provide a specific return to work release, based upon the can [sic] job description provided by the Self-Insurer, dated September 20, 2006. And, it is undisputed that the Self-Insurer then terminated benefits all based upon this release, as of October 1, 2006. The Employee claims that Dr. Bono's September of 2006 release to work does not specifically release the Employee to return to what was her concurrent employment, this release is somehow defective, thereby creating an illegal discontinuance. However, in reviewing the job description provided to Dr. Bono, and in consideration of the Employee's testimony regarding the job description of her concurrent employment as a home health aide for an [sic] disabled person, I find that these jobs are so similar in the physical requirements and responsibilities, that the release provided by Dr. Bono is in keeping with this job. I do not find that Dr. Bono's release is defective [or] that the Self-Insurer's reliance upon this was improper. I therefore find that the Self-Insurer did not illegally discontinue the Employee's benefits, and that the Employee is not entitled to reinstatement on this basis.

(Dec. 8-9.)

First, the judge did not err in concluding the June 13, 2006, notice failed to satisfy the requirements of § 8(2)(c). Even if we were to assume that where the employer is self-insured, delivery to the employer somehow satisfies delivery to

the insurer, and that hand delivery absolves the employee of the statutory duty to provide the notice "by certified letter," the letter itself was deficient on its face. The letter did not "inform the employer and insurer . . . that the disability resulting from the injury render[ed] [her] incapable of performing such work." General Laws, c. 152, § 8(2)(c).

Without citing any legal authority, the employee also renews on appeal, the following bare assertion advanced for the first time in her written closing argument to the judge: the self-insurer illegally discontinued her benefits because the *concurrent* employer never offered the employee a light duty job so, the employee "never truly 'returned to work' at all" pursuant to § 8(2)(c). (Employee br. 15.) The employee's assertion fails to rise to the level of proper appellate argument and need not be addressed.[5] Arslanian v. Department of Mental Retardation, 21 Mass. Workers' Comp. Rep. 83, 85 (2007).

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[5] In any event, we observe the assertion lacks merit for the following reasons. The employee's interpretation of § 8(2)(c) would require the employee to return to work at both employers' locations in order for the self-insurer and, for that matter, the employee to avail themselves of the privileges and protections bestowed by § 8(2)(c). In addition, it would require the parties to engage in litigation because it would effectively prohibit the self-insurer from adjusting the employee's weekly incapacity benefits, despite the employee's return to work, without first receiving an order from a judge allowing such action. In turn, the necessary delay in the modification of weekly benefits would inevitably result in an overpayment, exposing the employee to the additional hardship of a subsequent unilateral reduction in weekly benefits under § 11D(3). As such, it discourages attempts at trial periods of work and deprives employees of a quick means of returning to full benefits where, as a result of the injury, such an attempt is unsuccessful.

Instead, § 8(2)(c) allows insurers to modify or, as the situation dictates, discontinue benefits, simply where "the employee has returned to work." In addition, it specifically provides "that if due, compensation shall be paid under section thirty-five," thereby clearly indicating the legislature recognized the work the employee "returned to" may not necessarily be the same work the employee performed prior to the injury. Although the word "work" is not defined by the Act, the employee's interpretation ignores the ordinary meaning of the word and imposes additional conditions on the self-insurer's actions that simply do not appear in § 8(2)(c). A fair reading of § 8(2) in its entirety shows that where the legislature wished to impose a more restrictive standard on insurers, it used specific language to do so and avoided the use of the generic word "work." Compare § 8(2)(c), which applies where the "employee has returned to work," with § 8(2)(d), which applies where "the employee is capable of return[ing] to the job held at the time of

In addition, and again without legal support or citation to any actual figures supporting her assertions, the employee argues the payments she received after she left her light duty job on June 6, 2006 "did not account for her earnings lost from her concurrent employment." (Employee br. 15-16.) The judge expressly found the employee was paid § 35 benefits based on the wages earned at the light duty job and her pre-injury average weekly wage from her concurrent employments. (Dec. 4.) "[I]t bears repeating that we will affirm a decision where it is 'based on evidence and reasonable inferences therefrom and is supported by adequate subsidiary findings.' " Comolli v. Ade Corp., 18 Mass. Workers' Comp. Rep. 39, 43 (2004), quoting Kakamfo v. Hillhaven West Roxbury Manor Nursing Home, 14 Mass. Workers' Comp. Rep. 195, 198 (2000). Here, the judge's findings are based on the record evidence and are sufficient to support her conclusions.[6] When the employee stopped working at the light duty job and failed to comply with the requirements of § 8(2)(c), the self-insurer was under no legal obligation to reinstate the employee's § 34 benefits and did not act illegally by continuing payment of § 35 benefits.

In regard to the alleged § 8(2)(d) violation, the employee argues Dr. Bono was not the employee's "treating physician," and therefore his September 20, 2006 note releasing the employee to return to her CNA job with the employer could not be relied upon to terminate her benefits. She further argues the October 1, 2006, termination of her § 35 benefits was illegal because the self-insurer failed to provide a medical opinion specifically addressing the employee's ability to perform her concurrent employment. Finally, the employee contends the judge

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injury or other suitable job pursuant to section thirty-five D" and there is "a written report from the person employing said employee at the time of the injury indicating that such a suitable job is open."

[6] The judge's finding in this regard is amply supported by the facts stipulated by the parties, (Ex. 4, par. 6.), as well as the record evidence which shows the self-insurer continued to pay the employee at that same weekly rate after she left work on June 6, 2006. (Ex. 4H.)

erred in concluding the CNA job and the personal care attendant job are so similar in physical requirements and responsibilities that Dr. Bono's release covered the latter job as well. These issues concern questions of fact and the judge made findings of fact addressing each issue. Specifically, the judge found Dr. Bono's note was from the employee's "treating physician."[7] (Dec. 8.) While the judge acknowledged that Dr. Bono's note referred only to the requirements of the CNA job, she found, based on the employee's own testimony, that the physical requirements of the personal care attendant job did not exceed the physical requirements of the CNA job.[8] "[T]he judge's findings, including all rational

[7] The employee's contention that Dr. Bono is not one of her treating physicians is belied by her own Biographical Data Sheet, Form 160, in which she listed Dr. Bono as one of her treating physicians. (Ex. 2, 2.)

[8] In regard to the physical requirements of the personal care attendant job, the employee testified as follows:

> Q: What did you do in that job?
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> A: I have one patient, and he is very physical total. So I go in the morning. I will get him up from bed, take him to the shower, give him his - - every day shower. Then feed him breakfast. And after the breakfast, I will get him ready to go to his program, which the care will come and get him. Then I go to his room, do the bed, and do the laundry. And if I have to do a little cleaning sometimes, I do it. That's about it.
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> Q: Also fairly heavy job?
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> A: Yes.
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> Q: About the same physical requirements as the job for the City of Taunton?
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> A: Yes. And he is a Hoya [sic] lift. We have - - I have to use the Hoya [sic] to lift him up.
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> Q: That is a mechanism to help him out of bed?

inferences permitted by the evidence, must stand unless a different finding is required as a matter of law." Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112-113 (1999). Here, the judge's findings were amply supported by the evidence and her conclusions were legally sound. Accordingly, the decision is affirmed.[9]

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: ***June 7, 2010***

A: Yes.

(Tr. 13-14.) The employee did not testify the personal care attendant job duties were heavier or required more exertion than her CNA job duties, nor does the evidence require such an inference to be drawn.

[9] We do not reach or address whether § 8(2)(d) requires both a medical certificate and offer of suitable employment where the issue was neither raised below nor on appeal.