COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 014803-09**

Edgar J. Jaillet	Employee
Marten Transport, LTD	Employer
ACE American Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Maher.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee
JoAnn D. Walter, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

HORAN, J. The insurer appeals from a decision in which the administrative judge found the employer's job offer was not "suitable" within the meaning of G. L. c. 152, §§ 35D(3) and (5).[1] We affirm.[2]

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[1] Those sections provide, in pertinent part:

For the purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following: --

> (3) The earnings that the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it.
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> . . .
>
> (5) Implementation of this section is subject to the procedures contained in section eight. For the purposes of this chapter, a suitable job or employment shall be any job that the employee is physically and mentally capable of performing, including light work, considering the nature and severity of the employee's injury, so long as such job bears a reasonable relationship to the employee's work experience, education, or training, whether before or after the employee's injury.

[2] The insurer also argues the judge erred when he relied on the impartial medical examiner's opinion to award § 35 benefits for the thirty-seven week period prior to the

For about three years prior to his injury, the employee worked as a short-haul ("intermodal") truck driver, making daily deliveries within a one hundred mile radius of the CSX rail yard in Worcester, Massachusetts. (Dec. 6; Tr. 11, 37, 41.) Thus, the employee was able to return to his Leicester home after work each day. (Dec. 6; Tr. 39.) On January 16, 2009, he sustained an injury to his head and neck when he "slipped and fell while cranking a trailer at the rail yard in Worcester." (Dec. 10.)

The only issue at hearing was the extent of the employee's work related incapacity, if any, on and after April 24, 2009. (Dec. 5.) The judge adopted medical evidence establishing that the employee's "post concussion brain syndrome was related to the [industrial] accident," that he suffered from neck pain, remained unable to drive a truck, and was "capable of returning to full-time work with a lifting limit of up to 20 pounds. . . ." (Dec. 11-12.) Rejecting the employer's light duty job offer as unsuitable, yet persuaded by video surveillance evidence that the employee was "quite active," the judge assigned him a $400 earning capacity as of April 24, 2009. (Dec. 12-13.) Because the employee's pre-injury average weekly wage was $945.73, the judge ordered the insurer to pay him partial incapacity benefits at the weekly rate of $327.44 from April 24, 2009 and continuing. (Dec. 13.)

On appeal, the insurer argues the judge erred as a matter of law by concluding the employer's offer of light duty work was not "suitable" as contemplated by §§ 35D(3) and (5). Specifically, it maintains the judge's conclusion was improperly based on the location of the job offered. (Ins. br. 10-11.) It also requests that "if it is determined that the judge's reading of § 35D was contrary to law, then [it] would ask for appropriate elimination of the employee's weekly benefits, as the average weekly wage would have been entirely replaced." (Ins. br. 15.) We reject both arguments.

Cognizant of the employee's work-related medical restrictions, the employer offered him a light duty clerical job at its home office in Wisconsin. (Dec. 7; Tr. 20-

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§ 11A(2) examination. We summarily affirm the decision on this issue for substantially the same reasons as set forth in the employee's brief at pages 13-18.

21, 28-29.) This offer was first communicated to the employee by the employer's workers' compensation claims manager, Tom Schneck, in a phone conversation on March 25, 2009. (Tr. 20-22; Ex. 6.) Mr. Schneck wrote to employee's counsel regarding the offer in a letter dated April 2, 2009; it stated, in pertinent part:

> Because your client is restricted from driving, we offered to fly him to our Wisconsin headquarters (at our expense), arrange for accommodations (again at our expense), and assign him various clerical functions to perform at our headquarters. This work was to be made available for a three-week period following which we would arrange for return travel for your client to his home in order to complete any scheduled medical treatment. We would then have paid temporary partial disability benefits to compensate for any shortage between your client's temporary total disability benefit level and the wages he would have earned via light-duty employment.

(Ex. 6.) Mr. Schneck testified that when the employee refused the offer, his employment was terminated. (Tr. 22.)

On this record, we cannot conclude the judge erred as a matter of law by concluding that the job offered was not suitable. As the judge noted, prior to his injury the employee was able to return home from work each day. (Dec. 6.) The judge also found that while the job offer was advanced in good faith, "taking the employee away from his family and home for long stretches of time, after he has become accustomed to working as an intermodal driver [does] not seem an appropriate consideration under M.G.L. c. 152[, §] 35D(3)." (Dec. 11.)

In concluding the job offered was not suitable, (Dec. 12), the judge, finding no case directly on point, cited to dicta contained in a footnote in Major v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 90, 93-94 n.3 (1993):

> To offer a job far from the employee's former job or place of residence would, in our view, raise serious concerns. The question would arise whether a job offer under such circumstances would be bona fide or merely an attempt to establish an earning capacity . . . without any likelihood that the job could be accepted.

(Dec. 12.) In Major, the employee had moved out of state post-injury. Her employer offered her modified work within her physical capabilities, which she initially

performed; however, following a maternity leave, she moved to Killington, Vermont. Major, supra at 91. The reviewing board concluded the job offer complied with § 35D(3):

> On this record, the employer has clearly acted in good faith with respect to the original and continuing offer of modified employment. The employee has relocated, thus making the job offer impracticable, undesirable and probably impossible to accept. Having successfully performed the job previously, however, and not having demonstrated that she suffered any worsening in her condition, the job is a "suitable" one within the meaning of § 35D.

Id. at 94. See also Harvey v. Malden Hosp., 12 Mass. Workers' Comp. Rep. 412, 414 (1998)(voluntary relocation resulting in two hour commute not a factor in § 35D[3] job offer assessment); Caldwell v. Fleet Financial Group, Inc., 15 Mass. Workers' Comp. Rep. 199, 202-203 (2001)(reasoning from § 35D[3], employee's relocation to Arizona did not bar expert vocational testimony on suitable jobs available at her employer's Massachusetts locale).

This case presents material facts opposite from those in Major, where it was the employee who moved far from her employment locus post-injury. Here, the employee stayed home and, post-injury, the employer offered him a job located far from where he had lived and worked (travelling less than one hundred miles from Worcester, and his home nearby). These distinctions make a difference. Just as the suitability of an employer's job offer should not be defeated, as in Major, by the employee's voluntary (non-injury based) decision to move out of state post-injury, we discern nothing in the statute that prevents judges from considering geographical factors, and the particular circumstances of each case, to determine whether an extraterritorial or distant employment offer is suitable. To conclude, as the insurer would have it, that the employee should be required to accept a temporary job in Wisconsin, or suffer the modification or termination of his weekly incapacity benefits,[3] does not comport with the humanitarian principles underlying our workers'

[3] See General Laws c. 152, § 8(2)(d) and § 35D(3).

compensation act. See Conant's Case, 33 Mass. App. Ct. 695, 697 (1992). In sum, the judge did not err as a matter of law in concluding that the employer's job offer was not suitable, as that offer did not "bear[] a reasonable relationship to the employee's work experience . . . either before or after the employee's injury. . . ." G. L. c. 152, § 35D(5).

There is another distinct reason, derivative of the insurer's second argument, to deny its appeal. Even if the judge erred by rejecting the job offer as suitable, on this record there is no way of knowing whether that error would prove harmful to the insurer. It maintains it is entitled to an order terminating the employee's entitlement to his weekly § 35 benefits, based on the job offer, as "the [employee's] average weekly wage would have been entirely replaced" by the earning capacity established by the offer. (Ins. br. 15.) However, the record is silent respecting the amount the employee would have been paid had he accepted the offer.[4] The employer's letter bears this out. If the employee had accepted the offer, the employer "would then have paid temporary partial disability benefits to compensate for any shortage between your client's temporary total disability benefit level and the wages he would have earned via light-duty employment."[5] (Ex. 6.) Mr. Schneck, who authored the letter and testified about the job offer, never revealed how much the employee would have been paid had he accepted it. Therefore, we cannot discern whether the employee would have earned more, or less, than the $400 earning capacity assigned for the period in dispute.

[4] We note there is no evidentiary foundation for the judge's finding that the employee would have been paid "at a wage equivalent to the [his] average weekly wage" had he accepted the offer.

[5] Of course, had the employee accepted the offer and earned less than his $945.73 average weekly wage, the insurer would have been obligated to pay him sixty percent of the difference between his actual earnings and his average weekly wage – not the difference between his total incapacity benefit rate and his earning capacity. See General Laws c. 152, § 35.

Accordingly, we affirm the decision, and order the insurer to pay an attorney's fee under the provisions of § 13A(6) in the amount of $1,517.62.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **January 25, 2012**