COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 002844-97**

John A. Chalmers	Employee
City of Boston	Employer
City of Boston	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein and Carroll)

APPEARANCES
Ernest Piper, Esq., for the employee
John Walsh, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals from a decision in which the administrative judge awarded the employee compensation benefits. Because the judge failed to make findings on the self-insurer's allegation of § 14(2) fraud on the part of the employee, the case must be recommitted. In addition, the self-insurer argues that the employee is not entitled to benefits based on concurrent earnings because the alleged concurrent employer was uninsured on the date of the injury. On that issue the case must also be recommitted.

The employee was injured while working for the self-insurer on February 6, 1997, when he was struck by a car while getting into a truck. (Dec. 787-788.) At the time of his injury, the employee was also employed by Boston Towing. (Dec. 787.) The employee earned approximately $500.00 per week from Boston Towing. (May 21, 1998 Tr. 15.) The judge determined that the employee's work injury caused him to be totally incapacitated from the date of injury until November 14, 1997, and partially incapacitated thereafter. (Dec. 792.) The judge awarded benefits based on an average weekly wage of $932.00, reflecting $432.00 in weekly earnings from the self-insurer, and $500.00 in

weekly earnings from Boston Towing. (Dec. 792-793.) The self-insurer presents two arguments on appeal.

It first argues that the judge erred by failing to address its claim of § 14(2) fraud on the part of the employee, based on alleged false testimony regarding self-employment income. (Dec. 787.)[1] We agree that the issue of fraud was raised at hearing, (Dec. 784; April 15, 1998 Tr. 6), and that the judge erroneously failed to address it in the decision. See G.L. c. 152, § 11B ("Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision"). Leonard v. Merrimack Valley Regional Transit Auth., 12 Mass. Workers' Comp. Rep. 508, 509 (1998). Therefore, we recommit the case for further findings on this issue. Id.

The self-insurer's second argument is that the judge's implicit finding of concurrent employment is error, because the employee failed to prove that Boston Towing was an insured employer, within the meaning of c. 152, on the date of injury.[2]

There was evidence that Boston Towing was not insured on the day of the employee's industrial injury on February 6, 1997, because its policy of insurance had expired as of January 31, 1997. (Ex. 10 – DIA insurance register listing of Boston Towing.) See Chartier's Case, 19 Mass. App. Ct. 7, 10 (1984) (Legislature intended that concurrent insured employment must exist at the time of the injury). Nevertheless, the

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[1] Specifically, the self-insurer contends in its unpaginated brief that

> Contrary to Chalmer's sworn testimony, his tax records for 1997 do show a profit for that period. The judge failed to rule on the issue of whether Chalmer's sworn testimony to the effect that his expenses exceeded his gross receipts, rebutted as it is by his own tax records, is a false statement of fact pursuant to section 14.

[2] The judge did not explicitly find concurrent employment, but by finding the employee's average weekly wage to be $932.00, he in effect made that finding. (Dec. 792-793.)

General Laws c. 152, § 1(1), provides, in pertinent part:

> In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several insured employers and self-insurers shall be considered in determining his average weekly wages.

judge concluded that the employee's average weekly wage as of the date of injury included the employee's $500.00 weekly earnings from Boston Towing, as earnings from concurrent insured employment pursuant to § 1(1). However, the judge's subsidiary findings of fact are wholly inadequate for appellate review of this issue, since he gives no explanation for the result he reached. G.L. c. 152, § 11B. " 'A mere general finding in terms of the statute . . . is not . . . compliance with the intention of the Legislature as expressed in the workmen's compensation act.' " Praetz v. Factory Mut. Eng'g. & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993), quoting Demetrius's Case, 304 Mass. 285, 287 (1939).

Although it appears that Boston Towing's workers' compensation insurance had expired several days prior to the injury, (Ex. 10, supra), the employee argues that the judge's conclusion is correct since the interpretation of the relevant insurance coverage statute, G.L. c. 152, § 63, dictates that workers' compensation policies extend for a period of ten days beyond the term of the insurance policy. Section 63 provides, in pertinent part, as follows:

> [I]nsurance shall not be cancelled or shall not be otherwise terminated until ten days after written notice of such cancellation or termination is given to the rating organization or until a notice has been received by said organization that the employer has secured insurance from another insurance company or has otherwise insured the payment of compensation provided for by this chapter.

The record evidence, contained in Exhibit 10, supra, is that the Rating Bureau received notice of nonrenewal on November 25, 1996. Thus, the policy's termination on January 30, 1997 came many more than ten days after that notice of nonrenewal. We are not, however, aware of any controlling authority as to when to begin measuring § 63's ten day notice requirement.[3]

[3] The employee relies on a Superior Court ruling that notice to the Rating Bureau of non-renewal is not effective until the actual expiration date of the policy, with the ten days necessarily counting from that date. Such interpretation would add an additional ten days of unpaid insurance coverage. On the other hand, there is dictum in Frost v. David C. Wells Ins. Agency, Inc., 14 Mass. App. Ct. 305 (1982), that suggests a contrary interpretation; the court there stated that expiration or non-renewal notice to the

In any case, we need not now resolve that question. This is because, on the record in this case, we cannot determine the threshold question whether Boston Towing's policy of insurance was issued as an assigned risk policy to which the requirements of § 65B would apply. That statute reads, in pertinent part:

> If, after the issuance of a policy under section sixty-five A [assigned risk], it shall appear that the employer to whom the policy was issued is not or has ceased to be entitled to such insurance, the insurer may cancel or otherwise terminate such policy in the manner provided in this chapter; provided, however, that any insurer desiring to cancel or otherwise terminate such a policy shall give notice in writing to the rating organization and the insure[d] of its desire to cancel or terminate the same. Such cancellation or terminations shall be effective unless the employer, within ten days after the receipt of such notice, files with the department's office of insurance objections thereof . . . .

In the interest of justice, the judge may admit additional evidence so that he can make findings on the status of Boston Towing and whether the notices required by the relevant statutes were given to terminate Boston Towing's insurance coverage prior to February 6, 1997. On the requirement and adequacy of notice, see Fontaine v. Evergreen Constr. Co., 13 Mass. Workers' Comp. Rep. 62, 65-66 (1999) (discussing § 65B and G.L. c. 175, § 187C); Cuzzi v. The Ice Box, 11 Mass. Workers' Comp. Rep. 443, 445-446 (1997) (discussing § 65B).

Accordingly, we recommit the case for the judge to reconsider the evidence, to take additional evidence and to make such further findings of fact as are necessary to address the issues of § 14(2) fraud and § 1(1) concurrent employment. During the pendency of the new decision, the status quo shall be maintained as to the payment of weekly benefits.

So ordered.

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appropriate state authority was required under § 63 "to terminate the policy on its expiration date." Id. at 308.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: **December 14, 1999**