

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO.: 029903-04

John T. Foley, Sr.
Exxon Mobil Service Fleet Operations
Petroleum Casualty Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

APPEARANCES

Robert M. Peyser, Esq., for the employee
Michael T. Henry, Esq., for the insurer at hearing
Mark A. Teehan, Esq., for the insurer at hearing and on brief

HORAN, J. The employee appeals from a decision denying the application of the presumption of incapacity in § 8(2) to his claim for weekly benefits for the period following his termination from work.¹ We affirm the decision.

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

(2) An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:

. . .

(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 or subsection (4) of this section, 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; provided,

The employee underwent back surgery, necessitated by a prior work-related injury, before returning to work as a tanker truck driver in June 2004. He alleged he suffered two subsequent work-related back injuries, on July 31, 2004 and September 10, 2004. He had back surgery again on March 9, 2005, and was discharged by his treating physician six months later. (Dec. 5-7.)

The insurer paid § 34 benefits from September 10, 2004, to November 30, 2004, on a without prejudice basis. It subsequently denied the employee's claim for further benefits. Following the conference on the employee's claim, the judge issued an order awarding the employee § 34 benefits from November 23, 2004, to date and continuing. Both parties appealed to a full evidentiary hearing. (Dec. 2.)

On the first day of the hearing, November 17, 2005,² the employee testified he had recovered successfully from his last surgery and was virtually symptom free. (Dec. 7.) He also testified that he remained on workers' compensation benefits. (Tr. 72.) Following the employee's testimony, the parties stipulated the employee had been cleared to return to work on December 7, 2005 by a functional capacity evaluation performed at the employer's request. (Dec. 3-4, 13.) The parties also stipulated that before the employee had the opportunity to return to work following that evaluation, his employment was terminated. (Dec. 3, 13.) There is no evidence in the record, or

further, that if such employee accepts said employment subsequent to a modification or termination pursuant to this paragraph, compensation shall be reinstated at the prior rate if the employee . . . should be terminated by the employer because of the employee's physical or mental incapacity to perform the duties required by the job;

. . .

For purposes of clause (d) of this section, any termination of an employee within one year of resumption of work with his prior employer will be presumed to be for the reason that the employee was physically or mentally incapable of performing the duties required by the job or that the job was unsuitable for the employee, unless the insurer demonstrates the contrary by a preponderance of evidence at a subsequent proceeding.

² The employee did not testify on December 21, 2005, the second day of the hearing. The transcript page reference in this opinion is to the testimony taken at the hearing on November 17, 2005.

in the board file, that the insurer, at any time prior to the filing date of the hearing decision, modified or discontinued the payment of the § 34 benefits ordered at conference.

In his hearing decision the judge credited the employee's testimony, adopted the medical evidence clearing his return to regular work, and awarded him § 34 benefits from December 1, 2004 to December 7, 2005. (Dec. 12, 14.) The judge also ordered the insurer to pay for the employee's reasonable and necessary medical treatment, and an enhanced attorney's fee. However, the employee's claim for the application of § 8(2) was denied. (Dec. 14.)

The employee raises one issue on appeal. He contends the judge, when addressing the employee's claim for benefits for the period following December 7, 2005, erred by refusing to apply the presumption of incapacity found in the last sentence of § 8(2). We disagree. That presumption applies expressly to "clause (d) of this section. . . ." Section (d) of § 8(2) permits an insurer to unilaterally discontinue or modify an employee's weekly compensation payments in very specific circumstances. See footnote 1, supra. Here, there is nothing in the record to indicate that the insurer ever modified or discontinued the employee's benefits pursuant to § 8(2)(d). Consequently, the employee cannot prove that he accepted the employer's offer of work,³ yet was terminated "subsequent to a modification or termination pursuant to this [§ 8(2)(d)] paragraph." Because the requisite elements of the statutory presumption of incapacity are absent, we affirm the decision.

So ordered.

Mark D. Horan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

³ The judge found the employee "was terminated . . . before re-employment had begun or a written job offer had been extended." (Dec. 13; emphasis in original.) We note § 8(2)(d) requires only that the employee accept the employer's job offer; that section does not expressly require the resumption of work. Cf. General Laws c. 152, § 8(2)(c).

John T. Foley, Sr.
DIA Board No. 029903-04

Bernard W. Fabricant
Administrative Law Judge

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