

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 042612-02

Kevin MacDonnell
City of Worcester Parks and Recreation Dept.
City of Worcester

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Benoit.

APPEARANCES

Rickie T. Weiner, Esq., for the employee at hearing
James N. Ellis, Sr., Esq., for the employee on appeal
Charles E. Berg, Esq., for the employee at oral argument
Theresa M. Reichert, Esq., for the self-insurer

HORAN, J. Both parties appeal from a decision awarding the employee § 34A benefits, but authorizing the self-insurer to recoup benefits paid during the employee's ninety day stay in a rehabilitation center as part of his sentence for a federal conviction. We summarily affirm the decision respecting all issues raised by the parties but one. Relying on G. L. c. 152, § 8(2)(j),¹ at hearing the self-insurer argued the employee had forfeited his right to weekly workers' compensation benefits while he was an inpatient at the rehabilitation center. The judge agreed, and permitted the self-insurer to recoup those benefit payments. (Dec. 12.) We agree with the employee that his commitment to the rehabilitation

¹ General Laws c. 152, § 8(2)(j), provides:

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

. . . .
(j) the employee has been incarcerated pursuant to conviction for a felony or misdemeanor and has thereby forfeited any right to compensation during such period. . . .

center was not an incarceration. Accordingly, we reverse that aspect of the decision and vacate part of the judge's recoupment order.²

Following a § 10A conference on the employee's § 34A claim, the judge awarded § 35 benefits. The employee appealed and the matter proceeded to hearing, where a novel issue arose. On May 30, 2008 the employee pled guilty to a federal felony charge for which he had been incarcerated at the Worcester County House of Correction from January 29, 2008 until April 18, 2008 while awaiting trial. (Dec. 8.) A United States District Court judge sentenced the employee to incarceration for time served, and included ninety days of inpatient treatment at a rehabilitation center as one of the terms of probation.³ (Ex. 11.) The self-insurer maintained that the employee's ninety day stay at the rehabilitation center constituted an incarceration within the meaning of G. L. c. 152, § 8(2)(j), thereby relieving it of the obligation to pay weekly incapacity benefits during that period. The administrative judge agreed, reasoning that "as the Government was paying for this inpatient treatment, the Employee is not entitled to any workmen's [sic] compensation benefits for that 90-day period." (Dec. 11.) As a result, the judge added the ninety day period to the time the employee spent in jail, and allowed the self-insurer to recoup \$15,963.88 in benefits paid. (Dec. 12.)

The employee challenges the judge's construction of § 8(2)(j). The meaning of the term "incarcerated" is an issue of first impression. For two

² The employee does not challenge the judge's decision to deny his right to receive workers' compensation benefits from January 28, 2008 through April 18, 2008, when the employee was incarcerated at the Worcester County House of Correction. (Dec. 8-9.)

³ At the sentencing hearing, the judge noted the employee's sentence of time served "should reflect that he did serve a stretch in prison . . . and I'm going to sentence him to a term of supervised release, which is for all intents and purposes the same as probation." (Ex. 12, p. 15.) One of the conditions of the supervised release was that the employee "successfully complete at least 90 days of treatment at the Miller House. . . ." *Id.* The employee's right to leave the facility was left up to "Miller House or probation." *Id.* at 17.

reasons, we conclude the employee's stay at the rehabilitation center was not an incarceration. First, it was a specific condition of the employee's probation which, in turn, was a conditional sentence to be served in lieu of incarceration. (Ex. 11.) Probation regards the conditions under which the employee may avoid incarceration. "Probation, whether 'straight' or coupled with a suspended sentence, is a legal disposition which allows a criminal offender to remain in the community subject to certain conditions and under the supervision of the court." Commonwealth v. Durling, 407 Mass. 108, 111 (1990). "[T]he consequence of a disposition of straight probation is the deferment of sentencing to some unknown term of incarceration for a period of time in which the risk of incarceration can be eliminated by successful completion of the probationary period." Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 579 (2001). Thus, absent successful completion of the rehabilitation program, the employee was subject to "sentencing to some unknown term of incarceration" in a house of correction or prison. Id.

Second, the Appeals Court has determined that "at least for the purpose of determining credit for time spent in confinement, an inpatient drug treatment program as a condition of probation does not equal incarceration. See Reno v. Koray, 515 U. S. 50, 60 n.4 (1995)(applying similar logic in denying defendant credit for time spent awaiting treatment in halfway house); see also Massachusetts Sentencing Commission, Report to the General Court, at 33 (April 10, 1996)(‘residential programming’ and ‘substance abuse treatment’ listed as *alternatives to prison*).” Commonwealth v. Speight, 59 Mass. App. Ct. 28, 32 (2003)(Emphasis in original).

Accordingly, we reverse the decision insofar as it orders recoupment for the benefits paid during the employee's ninety-day stay in the rehabilitation center, and vacate that part of the recoupment order. We otherwise summarily affirm the decision. Pursuant to G L. c. 152, § 13A(6), the self-insurer is to pay employee's counsel a fee in the amount of \$1,488.30.

So ordered.

Kevin MacDonnell
Board No. 042612-02

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **August 30, 2011**