COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 11148-98**

Kevin J. Mello	Employee
Bristol County Sheriff's Office	Employer
County of Bristol	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Levine & Carroll)

APPEARANCES
Paul S. Danahy, Esq., for the employee
Robert M. Novack, Esq., for the self-insurer

MCCARTHY, J. The self-insurer appeals a decision of an administrative judge awarding the employee compensation benefits for his work-related back injury and psychological sequelae. Of the five issues argued by the self-insurer on appeal, we address two. We affirm the decision as to the conclusion that the light duty job offer was unsuitable for the employee. We reverse the award of penalties under §§ 7(2) and 8(5), as there was no evidence presented on when the appropriate authority of the public self-insurer received the first report of injury. We summarily affirm the decision as to all other matters.

Mr. Mello worked as a correctional officer at the Bristol County House of Corrections. On April 16, 1998, the employee injured his back while breaking up a fight between two inmates. He left work and treated conservatively with an orthopedic surgeon and a neurosurgeon. The employee also began treating with a psychiatrist for depression. Mr. Mello had no prior history of psychiatric or psychological treatment. (Dec. 4-5.)

The self-insurer offered the employee a position in dispatch control, located in a "bubble." The offer was made in accordance with the restrictions set by the self-insurer's medical expert. The job entailed controlling doors through which inmates and deliveries would pass. The dispatch control officer was required to inspect vehicles, and to

intervene in altercations if necessary. The officer also needed to pass inmates on his way to the post. The employee rejected the offer based on the likelihood of inmate contact and the fact that he needed to lie down two or three times a day due to pain. (Dec. 6-7.)

The judge allowed additional medical evidence at the hearing due to the inadequacy of the impartial physician's report under Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997)(impartial medical opinion that falls outside the medical dispute delineated by parties' medical evidence submitted for review pursuant to § 11A(2) is inadequate). (Dec. 3, 8.) The parties introduced numerous orthopedic and psychiatric reports. (Dec. 8-11.) Relevant to this discussion, the judge adopted the opinion of the employee's treating orthopedic physician, Dr. Burden, who placed substantial restrictions on the employee's lifting, bending and twisting. Doctor Burden additionally restricted the employee from having any inmate contact whatsoever. Consistent with this last restriction, the judge determined that there was no position in the House of Corrections that the employee could perform including the light duty job offer in the "bubble." (Dec. 12.) The judge otherwise concluded that the employee was totally incapacitated by his orthopedic and psychiatric conditions and awarded § 34 and § 30 benefits accordingly. (Dec. 12, 14-15.)

There was no error in the judge's rejection of the self-insurer's job offer. Under G. L. c. 152, § 35D(3),[1] an employer's job offer must be both "available," i.e., a real job with real duties and wages, and "suitable," i.e., within the employee's medical restrictions.[2] The question can arise as to whose medical restrictions those would be. The only logical answer is that whichever doctor the judge adopts is the doctor whose restrictions should apply for the purposes of determining § 35D(3) "suitability." Here the

[1] General Laws c. 152, § 35D(3), provides for an assessment of earning capacity using "[t]he earnings 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."

[2] General Laws c. 152, § 35D(5), defines "a suitable job" as "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, either before or after the employee's injury."

judge adopted the employee's treating doctor, Dr. Burden, who stated that the employee should not have any inmate contact. As the "bubble" position included the potential for inmate contact, the job was unsuitable for the employee. The judge's rejection of the job offer was well supported, and certainly not arbitrary and capricious. Cf. Corkery v. General Motors Corporation, 13 Mass. Workers' Comp. Rep. 222, 225 (1999)(error for judge to substitute different restrictions for those enunciated by sole medical opinion of impartial physician in determining § 35D(3) suitability).[3]

The judge's award of penalties under §§ 7(2) and 8(5), on the other hand, was not supported by the evidence adduced at hearing. The relevant background is as follows. The employee's injury occurred on April 6, 1998. The Bristol County Sheriff's Office did receive notice of the injury on the same day. (Employee's Exhibit 11.) Payment of the employee's indemnity benefits did not commence until May 12, 1998. (Dec. 13; Employee Exhibit 8.) The self-insurer terminated its payments on July 8, 1998, with the seven days notice required under § 8(1) for § 7 payments made without prejudice. (Employee Exhibit 9.)

On its face, this scenario would appear to make out a claim for penalties and the judge so concluded:

> The Act requires the self-insurer to institute payment or send a notification of denial within fourteen days of receipt of a first report of injury. A number of reports have been entered into evidence which demonstrate that the injury occurred on April 6, 1998 and that the self-insurer was notified. Pursuant to § 7(1) the self-insurer was required to either pay or deny the claim within fourteen days for [sic] receipt of an employer's first report of injury. In this case the self-insurer did not vote on the warrant for payment until May 12, 1998. Employee's Exhibit No. 8.
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> Pursuant to § 8(1), the pay without prejudice period is available to a self-insurer that makes timely payments under § 7(1). It would therefore follow that the payments that were made beginning May 12, 1998 were not made without

[3] Whether Mr. Mello was physically capable of performing the proffered job is not in and of itself determinative of his earning capacity. The judge also adopted the expert opinions of three psychiatrists and found that, " . . . the employee's current psychiatric condition is causally related to his work-related back injury and that he is totally psychiatrically disabled as a result." (Dec. 12; emphasis added.)

> prejudice. That being the case any unilateral termination of benefits would be inappropriate under the Act. In this matter the self-insurer terminated the employee's 'benefits effective July 6, 1998. As the self-insurer could not avail itself of the benefits of the pay without prejudice period, I find that the employee's benefits were illegally discontinued and that the self-insurer is subject to penalties under § 8(5). Additionally, pursuant to § 7(2) the self-insurer is subject to pay the employee a penalty of $200.00 for failing to commence payment or deny the claim.

(Dec. 13.)

The judge's analysis misses one important factor which the self-insurer correctly argues on appeal. The self-insurer in this case is a public employer. The rules regarding timely payment under §§ 7 and 8 are not the same for self-insured public employers as they are for private employers and insurers. Such public employers are governed by the provisions of G.L. c. 152, § 75, which pertinently provides:

> Every board, commission and department of the commonwealth, and every such county, city, town, and district shall through its executive offices or board, designate one or more persons, as it may deem necessary, to act as its agent or agents in furnishing the benefits due under sections sixty-nine to seventy-five, inclusive [bringing public employers within the Act]. Such agent or agents shall be responsible for the proper carrying out of said sections under the direction and supervision of the department until his or their agency is revoked and a new agent or new agents designated. . . . This section shall not apply to counties, cities, towns and districts which have provided by insurance for the payment of compensation required by this chapter for all of their employees.

Under the provisions of G.L. c. 34, § 14, the Office of the County Commissioners is the § 75 agent for the Sheriff's Office: The commissioners "shall have authority to represent their county, and to have the care of its property and the management of its business and affairs in cases where not otherwise expressly provided . . . ." Thus, the question is when did the county commissioners receive notice of the employee's injury from the Sheriff's Office? See Hepners' Case, 29 Mass. App. Ct. 208, 213-214 (1990)(public employer compensation agent's receipt of employer's notice of injury triggers the fourteen day period under § 7, functioning "like an insurer for a private employer").

The evidence in the record does not answer this question. As it was the employee's burden to prove his claim to a § 7(2) penalty for dilatory commencement of payment, we conclude that the employee has not carried that burden. Since the § 8(5) penalty is based on the allegedly illegal discontinuance of payments on July 6, 1998, that claim must also fail. The self-insurer was paying without prejudice, and could terminate payment at any time with seven days notice.

Accordingly, we reverse the award of penalties under §§ 7(2) and 8(5). We otherwise affirm the decision.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **September 24, 2002**

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge