COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 027811-96**

Muriel Cassidy	Employee
Sodexho USA	Employer
Travelers Casualty & Surety Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
Muriel Cassidy, pro se
Richard P. Bock, Esq., for the insurer

WILSON, J. Muriel Cassidy appeals from a decision in which an administrative judge denied her claim for further weekly incapacity benefits for an accepted industrial injury that occurred while the employee was moving furniture in June 1996. The judge credited the employer's testimony that Ms. Cassidy had been offered a light duty job, and "[a]s she did not take it, she is not entitled to weekly benefits under section 35D(3)." (Dec. 5.) Because the judge erred in finding that the employer's job offer satisfied the requirements of § 35D(3), we reverse and recommit the case for further findings.

Muriel Cassidy worked as a housekeeper for a corporation that provided cleaning services for the Berkshire School. After she injured her neck and shoulder in June 1996, she was out of work for a short while and returned to light duty. The arrangement to return apparently did not work out and the employee filed the present claim for further compensation. At the § 10A conference, the judge ordered the insurer to pay a closed period of benefits ending June 20, 1997, based on the strength of a light duty job being made available to her. The conference order stated: "The closed period order is based on the employer's representations that there can now be a job for the employee similar in

duties to the one she performed in January and February." (Conference Order of Payment under § 34, June 12, 1997.) On June 23, 1997, the employee met with her supervisor regarding her return to work. The meeting was called to work out the specifics of the light duty job that the employer would offer the employee. (Dec. 2.) At that meeting, the supervisor gave Cassidy a memorandum that outlined the full duty housecleaning job, without modifications, along with a list of the medical restrictions that he understood the treating doctor had placed upon her. (Ins. Ex. 2.) The memorandum went on to state that: "In order to be most effective at accommodating the above listed limitations, we ask that you bring any inadvertent deviations in your routine to our attention immediately. I request that you indicate the tasks, times, buildings, etc. that you feel are beyond those restrictions. Further, in order to be sure that we are fully communicating, I ask that you *indicate these deviations in writing*, and that you *do not engage in these activities* until we have clarified the deviation with your doctor." (Ins. Ex. 2; emphasis in original.) The supervisor expected that the employee was to punch in to work as usual on that day of the meeting, and that they would walk the Berkshire School campus and decide what she could and could not do. (Tr. 109.) The employee did not take the supervisor up on his offer. (Dec. 3.) The attending physician had neither released Cassidy for work at that time, nor on August 1, 1997 when a similar job offer was made. (Dec. 3.)

The impartial physician opined that the employee was not capable of returning to unrestricted work due to small disc herniations at C4-5 and C5-6, without evidence of nerve root compression. The doctor believed that Ms. Cassidy could return to a job "with lifting limits of 10 pounds, and limited pushing or pulling of up to 10 pounds. He state[d] that she could probably do a job within these restrictions up to forty hours per week." (Dec. 4.)

The judge found that the employer had made a good faith effort to accommodate work for the employee. While recognizing that Ms. Cassidy "does not have much in the way of earning capacity in the open labor market[,]" (Dec. 4), the judge applied § 35D(3), finding that the employer had offered a particular suitable and available job, within the employee's capabilities. The judge found: "The job offer made recognizes the

limitations substantially similar to those suggested by the impartial doctor." (Dec. 4.) The judge further noted that Ms. Cassidy had "made no effort to institute a meeting that could work out a suggested routine within the confines of the memo, as clearly suggested in the memo." (Dec. 3.) As a result, the judge denied the claim for further weekly incapacity benefits. (Dec. 6.) The employee appeals.

The judge's finding that the employer had offered the employee a job within the scope of G.L. c. 152, § 35D(3), is contrary to law. That subsection states:

> 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 the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and [s]he is capable of performing it. The employee's receipt of a written report that a specific suitable job is available to [her] together with a written report from the treating physician that the employee is capable of performing such job shall be prima facie evidence of an earning capacity under this clause.

The employer never made an offer of a <u>particular suitable job</u> under § 35D(3). The "offer" was always indefinite; it was a general pledge to make accommodations. The employer, through its supervisor, required the employee to start work, before any specific, suitable job was made available to her. Although the employer's memorandum set out medical restrictions, it never applied those restrictions to the employee's housekeeping job. Instead the memo was a compilation of all of the duties of an able-bodied housekeeper. The failure to tailor the duties to the restrictions is not one of mere form. The employer must under § 35D(3) put forward a job offer in which the required duties are within the employee's medical restrictions. The employer directed the employee to "punch in" to the as yet undefined light duty job, before she knew if the job duties exceeded her physical capacity. The employee has to know what she is getting into before she can be held to the statutory obligation under § 35D(3) of accepting a job offer,

or forfeiting her right to weekly incapacity benefits.[1] As such, the job offer did not satisfy the requirement of § 35D(3) that it be "particular" and "suitable."

For these reasons, we reverse the judge's findings and conclusion that the employer offered the employee a particular suitable job within the meaning of § 35D(3), and recommit the case for further findings on the employee's earning capacity.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: February 14, 2000

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William A. McCarthy
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge

[1] The August 1, 1997 "job offer" suffers from the same inadequacies.