COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board No.** 033209-04

Richard W. Cookson, Jr. **Employee**
Suffolk County Sheriff's Dept. **Employer**
Commonwealth of Massachusetts[1] **Self-insurer**

REVIEWING BOARD DECISION
(Judges Horan, Levine and Fabricant[2])

The case was heard by Administrative Judge Heffernan.

APPEARANCES
Michael C. Akashian, Esq., for the employee
Charles J. Abate, Jr., Esq., for the self-insurer at hearing
Arthur Jackson, Esq., and Radha Tilva, Esq., for the self-insurer on brief

HORAN, J. The self-insurer appeals from a decision awarding the employee a closed period of § 34 total incapacity benefits and ongoing § 35 partial incapacity benefits. It maintains the judge's decision is internally inconsistent, and that he erred by failing to terminate the employee's benefits following its offer of suitable employment. See § 35D.[3] We affirm the decision.

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[1] According to the board file, at the hearing the City of Boston was the self-insurer. By the time the decision was appealed, the Commonwealth of Massachusetts had assumed responsibility for the payment of compensation as self-insurer.

[2] Judge Fabricant recused himself from this case and did not participate in panel deliberations.

[3] General Laws c. 152, § 35D, provides, in pertinent part:

The employee, at the time of hearing, was a thirty-five year old married father of two minor children. He has an associate's degree in business administration. In 1997, the employee commenced employment with the Suffolk County Sheriff's Department as a jail officer. His prior employment included various part-time jobs, including several years of clerical experience. (Dec. 4.)

On October 21, 2004, the employee was injured during a prison uprising. He fell "into a pile" while attempting to restrain an inmate, and "began to experience lower back pain that radiated into his lower extremities. . . ." (Dec. 4-5.) The employee has not returned to work since that date. (Dec. 5.) The self-insurer accepted liability, and paid the employee for two periods of disability until January 18, 2008. (Self-ins. br. 2.)

Following a conference on the employee's claim for further §§ 34 and 35 benefits, the self-insurer was ordered to pay the employee ongoing § 35 benefits retroactive to May 31, 2007.[4] Only the self-insurer appealed the conference order. (Dec. 3.)

On December 18, 2007, Dr. Joseph M. DeMichele conducted a § 11A examination. His report and deposition testimony were the only medical evidence at hearing. (Dec. 2-3.) Dr. DeMichele opined the employee sustained a lumbosacral sprain and disc herniation at L5-S1, superimposed on pre-existing degenerative changes. He also stated the employee was "not capable to perform the physical demands of his regular job as a jailer officer," but could do light duty work, so long as he avoided frequent lifting in excess of twenty pounds, and was "allowed to shift position-change posture as needed." (Stat. Ex. 1; Dec. 6-7.)

> For 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 he is capable of performing it.
> >
> > (4) The earnings that the employee is capable of earning.

[4] The employee's claim for illegal discontinuance was also denied, and he did not appeal. (Dec. 3.)

At his deposition, the doctor restricted the employee from engaging in "prolonged twisting, bending, combined upper extension and twisting." (Dep. 8.) He acknowledged that an EMG study supported his view that the employee suffered from an L-5 radiculopathy in his right leg, and agreed the medication the employee was taking for this work related condition made him "somnolent." (Dep. 6, 13, 17.) The doctor was then presented with a job description of a control booth officer, which is primarily sedentary work.[5] When asked if the employee could perform this adjusted work, the doctor opined the employee could perform such tasks, "[a]s long as he has a chance to shift position and there's a reasonable sitting chair, more ergonomic . . . that helps him shift the position from the painful side he probably can manage." (Dep. 12.) He also agreed that if the employee's prescribed medication caused somnolence, that factor could interfere with his ability to perform that work. (Dep. 13, 23.)

In accordance with the impartial examiner's medical opinion, the judge found the employee was temporarily, totally disabled for a period of time following his injury.[6] (Dec. 12.) He credited the superintendent's testimony that in order to work in the control booth, the employee would have to be "alert, with good faculties and good concentration." (Dec. 10.) Further, giving partial credit to the employee's complaints of symptoms including "difficulty with concentration, distraction, grogginess, [and] sleepiness," and noting that Dr. DeMichele testified the employee could perform the control officer's job if he was provided with an ergonomic chair, the judge concluded the employee was unable to perform that job, and awarded the employee partial incapacity benefits from December 19, 2007, to date and continuing. (Dec. 7, 10-11, 12.)

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[5] The judge "took a view" of the control booths at the Nashua Street Jail, credited the testimony of Eugene Sumpter, Superintendent of the Suffolk County Jail, and found the position(s) as described were "an accurate description of the duties of Control booth Officer." (Dec. 9.) The control booth officer job would permit the employee to sit or stand at will within an enclosed area. He would be responsible for making entries in log books, call for assistance if necessary, and electronically open and close cell doors. The employee would be required to remain in the booth until relieved by another officer. (Tr. 53-57; Dep. 9-12.)

[6] There is no issue on appeal respecting the period of the employee's total incapacity.

On appeal, the self-insurer contends the judge erred by mischaracterizing Dr. DeMichele's opinion. We disagree. Dr. DeMichele's final opinion was that the employee could perform the control booth officer's job *if* he was provided with an ergonomic chair. (Dep. 12.) There was no evidence that the self-insurer offered such an accommodation. Additionally, the doctor agreed the prescription drugs taken by the employee for his industrial injury would be expected to cause the side effects he described at the hearing. (Dep. 6, 13, 21; Tr. 21-23.) The judge, at least to some extent, credited the employee's testimony on this subject. (Dec. 10-11.) Based on the facts as found, the judge was not required, per § 35D(3), to conclude that the employee was capable of performing the control booth officer's job. There was no error.[7]

The self-insurer's second argument is essentially a restatement of its first. Because he did not mischaracterize Dr. DeMichele's opinions, the judge's decision is not, as the self-insurer posits, internally inconsistent.

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the self-insurer is ordered to pay employee's counsel an attorney's fee in the amount of $1,488.30.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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[7] We note that even if the ergonomic chair had been part of the job offer, the self-insurer's argument that the employee's benefits should have been terminated, as a matter of law, as of the date of the offer would fail, as the evidence does not reveal what the employee would have earned working as a control booth officer. See Raczkowski v. Center for Extended Care, 18 Mass. Workers' Comp. Rep. 289, 290 n.2. (2004).