COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 14258-99**

Robert F. Lindsey	Employee
Stop & Shop	Employer
Stop & Shop Companies, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Levine & Maze-Rothstein)

APPEARANCES
Thomas F. Donoghue, Esq., for the employee
William J. Doherty, Esq., for the self-insurer

MCARTHY, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee one month of § 34 incapacity benefits for a work-related right arm injury. The self-insurer argues that the judge erred by not listing its investigative videotape as an exhibit in his decision. This oversight is harmless, as the tape is not germane to the reasoning of the judge in awarding benefits. The self-insurer also contends that it was error to allow in evidence a report of a physical therapist who treated the employee. This argument is likewise without merit because the report was introduced without objection during the deposition of the employee's attending family physician, Dr. Barry Magnus. (Dr. Magnus Dep. 25.) Moreover, the judge's decision does not turn on the contents of this report. We summarily affirm the decision with regard to these arguments. The insurer also argues that the judge's award of benefits was without medical support, as the only medical evidence from August 1999 – the month in which benefits were awarded – established that the employee could return to full duty work. We briefly address this argument, and affirm the decision.

The self-insurer commenced without-prejudice payments for total incapacity, in accordance with G.L. c. 152, § 7(1), for the employee's April 22, 1999 right arm injury.

The employee underwent physical therapy from May through July. Toward the end of his therapy, the employee played some golf, which caused no increase in his arm pain. (Dec. 2.) The employee contacted the employer regarding the possibility of light duty work, but the employer did not offer such accommodation. (Dec. 3.) The self-insurer stopped payments without-prejudice as of July 31, 1999. This termination is not at issue.

The employee's doctor released him to return to full duty work on August 19, 1999. When the employee then contacted the employer, he was informed that the employer's physician had to clear him before he could return to work. The employee saw that doctor on August 27, 1999 and returned to work four days later. (Dec. 2-3.)

The employee filed a claim for § 34 benefits for the month of August 1999, which the self-insurer denied. (Dec. 2.) The judge concluded, after a hearing on the matter: "While the insurer now quibbles over whether he should have returned to work a few weeks sooner than he actually did, I find that Mr. Lindsey acted in a reasonable fashion, and in accord with his medical providers. . . . As his employer had made it clear that he should not return until he was under no restrictions, (and until after their own doctor had confirmed this), the timeframe [sic] of his activities and treatment is reasonable." (Dec. 3.) The judge therefore awarded the employee § 34 incapacity benefits for the month of August 1999. The self-insurer now appeals to the reviewing board, contending that the medical evidence does not support the award of § 34 benefits and that the decision should be reversed.

This case is governed by Scheffler's Case, 419 Mass. 251 (1994), which emphasized that,

> "[c]ompensation is not awarded for personal injury as such but for 'incapacity for work.' This concept combines two elements: physical injury or harm to the body, a medical element, and loss of earning capacity traceable to the physical injury, an economic element. . . . [A]n injury is not compensable unless the physical injury causes an impairment of earning capacity.
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> The nature of the job, seniority status, *the attitudes of personnel managers* and insurance companies, the business prospects of the employer, and the strength or weakness of the economy also influence an injured employee's ability to hold a job or obtain a new position."

Id. at 251, citing L. Locke, Workmens' Compensation, § 321, at 375-376 (2d ed. 1981)(emphasis added). Respecting the present case, we think it appropriate to add that "the attitudes of personnel managers . . . also influence an injured employee's ability" *to return to his former position.* Certainly, the employee's physical injury caused his absence from the workplace in August 1999. The employee had sought, but was denied, a light duty assignment. Then, when the employee was cleared by his own doctor to return to work, he was informed by the employer that he would still need to be released for full duty by the employer's medical examiner. During the month between the termination of weekly § 34 benefits and the employee's return to work, we agree with the judge that the employee acted in a reasonable fashion. "As his employer made it clear that he should not return until he was under no restrictions, (and until after their own doctor had confirmed this), the timeframe [sic] of his activities and treatment is reasonable." (Dec. 3.) Mr. Lindsey's inability to return to work during August 1999 was not due to anything for which he was responsible, but to the employer's own personnel policies. As such, the award of weekly benefits for that month was consistent with Scheffler, supra, and was not arbitrary, capricious or contrary to law.

The decision is affirmed. As required by § 13A(6) of the Act, the self-insurer is directed to pay a legal fee of $1,243.36 to the employee's attorney.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **August 8, 2001**

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge