COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016660-99**

Robert F. McCambly	Employee
Massachusetts Bay Transportation Authority	Employer
Massachusetts Bay Transportation Authority	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Horan)

APPEARANCES
Chester L. Tennyson, Esq., for the employee
Joanne T. Gray, Esq., for the self-insurer at hearing
Paul Ingraham, Esq., for the self-insurer at hearing and on appeal

COSTIGAN, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee § 34A permanent and total incapacity benefits for a May 6, 1999 work-related low back injury. The self-insurer argues the judge erred by failing to deem the light duty job offered by the employer suitable and available, within the meaning of § 35D,[1] and by awarding a § 8(5) penalty[2] for the self-insurer's illegal modification of weekly benefits. We affirm the decision.

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[1] General Laws c. 152, § 35D, provides, in pertinent part, that an employee's earning capacity may be based on:

> (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.
>
> . . .
>
> (5) For purposes of this chapter, a suitable job or employment shall be 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.

[2] General Laws c. 152, § 8(5), provides, in pertinent part:

The employee's low back injury led to surgery in November 1999, but without lasting relief of symptoms. The self-insurer paid § 34 total incapacity benefits to statutory exhaustion on May 6, 2002, and the employee filed a claim for § 34A benefits. By § 10A conference order filed in November 2002, the judge ordered payment of the claimed benefits from and after May 7, 2002. The self-insurer appealed, and on October 3, 2003, Dr. Frederick S. Ayers, an orthopedic surgeon, examined the employee pursuant to G. L. c. 152, § 11A(2). (Dec. 1-2.)

Dr. Ayers diagnosed lumbosacral strain with aggravation of a pre-existing back condition with lumbar stenosis,[3] and tendinitis of the left heel cord. He causally related only the employee's back condition to the 1999 work injury, and opined the employee had a permanent partial medical disability. The impartial physician considered the employee capable of performing a sedentary-type position with sitting and standing at will, no lifting greater than 10 pounds, and no stooping, bending or squatting. Dr. Ayers thought the employee should attempt a gradual return to restricted work, starting with an initial three-hour day. (Dec. 5-6.) The judge adopted the § 11A examiner's opinions. (Dec. 6-7.)

Shortly after Dr. Ayers filed his report, the MBTA sent the employee a letter dated November 10, 2003, which stated, in pertinent part:

> Please be advised that the MBTA currently has a temporary modified work assignment within its light-duty program as a **Collector**. Enclosed please find a copy of that light-duty job description.
>
> At this time, *we would like to offer you the opportunity to interview*

> Except as specifically provided above, if the insurer terminates, reduces, or fails to make any payments required under this chapter, and additional compensation is later ordered, the employee shall be paid by the insurer a penalty equal to twenty per cent of the additional compensation due on the date of such finding.

[3] This pre-existing condition was due, in part, to an earlier, work-related low back injury, resulting in a 1995 surgery, thereby removing the § 1(7A) heightened causation standard for combination injuries from consideration in the case. (Dec. 4; Tr. 14.) See Couch v. Gill-Montague Sch. Dist., 20 Mass. Workers' Comp. Rep. 237, 242 (2006).

> *for this position. If you are interested in this position, an interview can be scheduled to discuss this job in further detail.*
>
> Also, please be advised that your part-time position of **Bus Operator** remains open and available to you.

(Joint Ex. 1; bold emphasis original; italicized emphasis added.)[4] Although the employee was not questioned at hearing about whether he followed up with his employer after receiving the letter, apparently he did not do so in the ensuing two weeks.

By letter dated November 24, 2003, (Joint Ex. 2), the self-insurer notified the employee that based on Dr. Ayer's opinion of partial disability, and its purported light duty job offer, it was going to modify his weekly benefits effective December 6, 2003, as authorized by G. L. c. 152, §§ 11A and 8(2)(d).[5] The next day, the employee, through his attorney, sent a letter to the MBTA objecting to the proposed modification of weekly compensation as illegal, and rejecting the "job offer" for the stated reason that he was unable to perform that job, or any other work, at that time. (Joint Ex. 3.)

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[4] Based on the narcotic pain medication the employee was then taking, Dr. Ayers testified that the employee should not operate "any type of high tech machinery," such as a bus. (Dep. 10.) Moreover, the self-insurer's questioning of the impartial physician focused solely on the employee's physical ability to perform the collector's job, not his regular job of bus driver. (Dep. 19-23.)

[5] General Laws c. 152, § 8(2)(d), provides, in pertinent part:

> (2) An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:
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> . . .
>
> (d) the insurer has possession of (i) a medical report from the treating physician, or, if an impartial medical examiner has made a report pursuant to section eleven A . . . , the report of such examiner, and either of such reports indicates that the employee is capable to return to the job held at the time of injury, or other suitable job pursuant to section thirty-five D consistent with the employee's physical and mental condition as reported by said physician and (ii) a written report from the person employing said employee at the time of the injury indicating that such a suitable job is open and has been made available, and remains open to the employee. . . .

With reference to the physical restrictions identified by Dr. Ayers, the judge found that the employee "does not possess the wherewithal to be employable within those restrictions absent substantial accommodations that he is unlikely to receive from employers with whom he does not have a history." (Dec. 6.) The judge found that the employee "would be able to perform all the major duties listed in the job description for the collector," (Dec. 7), but focusing on the temporary nature of the job, the judge found it not suitable under § 35D:

> No evidence was presented as to [the] length of time that this "temporary" assignment might be available. The record is devoid of any testimony or evidence as to whether the temporary term of this modified job can be extended, as to whether it can be or is likely to be convertible into a permanent assignment, or whether it is of a truly limited duration. Those factors cannot be assumed and are not the proper subject of judicial notice. Evidence must be presented for me to take the offer as being anything more than that which was explicitly described in the November 10, 2003 letter.

(Dec. 8.) For these reasons, the judge found the collector's job as offered to be unsuitable for the employee, who was at a medical end result and whose physical work restrictions were permanent. Id.

The judge also found that the self-insurer's unilateral reduction of benefits was not in compliance with § 8(2)(d), as the job offered did not pass the test of suitability under § 35D. (Dec. 9.) Accordingly, the judge ordered payment of § 34A benefits from and after May 7, 2002, including the period when the self-insurer unilaterally modified the employee's weekly compensation to § 35 maximum partial incapacity benefits. He also awarded a penalty under § 8(5) of twenty per cent of the difference between the employee's § 34A and § 35 rates. See footnote 2, supra. (Dec. 10-11.)

The self-insurer contends that the judge's interpretation of the word "temporary" in its job offer is arbitrary and capricious. We need not decide that issue, because we think the judge reached the correct result, but for the wrong reason.

Notwithstanding the judge's careful analysis of the purported "job offer," and the arguments advanced by the parties in their appellate briefs about the suitability of the collector's postion offered, no fair reading of the MBTA's November 10, 2003 letter to the employee permits the conclusion that this was a job offer at all. The only thing offered was "the opportunity to interview" for the collector's position. The letter was not an actual offer for the position of collector, within the meaning of § 35D.[6] Although the employer might have offered the collector position to the employee after an interview, it very well might not have.[7]

An invitation to interview for a position simply is not a job offer. As there was no job offer in the first place, the judge's decision to exclude from his earning

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[6] Therefore, the cases cited by the self-insurer in its brief are distinguishable on their facts. See Auclair v. Marshalls, 17 Mass. Workers' Comp. Rep. 522 (2003)(offer of generic, non-particular, non-actual job within restrictions identified by § 11A physician not suitable under § 35D, insurer's unliateral termination of benefits illegal under § 8(2)(d); Mello v. Bristol County Sheriff's Office, 16 Mass. Workers' Comp. Rep. 376 (2002)(job offered based on restrictions identified by self-insurer's medical expert not suitable when adopted medical expert precluded employee from performing that job); Gulla v. Grieco Bros., Inc., 14 Mass. Workers' Comp. Rep. 300 (2000)(judge permissibly inferred that light duty job previously attempted by employee remained available to her).

[7] As to the collector's job, the judge wrote:

> I find this to be the one job that exists in a setting that would allow for a likelihood that Mr. McCambly could make a successful return to meaningful work. Were this to have been an open-ended offer of a position with the reasonable acommodations needed for the employee's return to the workforce, I would have found it to be a suitable job under § 35D and would have found it appropriate to use as the basis for the assignment of an earning capacity.

(Dec. 8.) As there was no job offer, the judge's finding that an open-ended offer would have rendered the job suitable under § 35D is moot. We note, however, that one of the "Position Requirements" for the collector's job is, "[b]asic reading, writing and arithmetic skills as normally attained through a high school education or equivalent." (Joint Ex. 1.) The judge, however, found that the employee "has only a seventh grade education," that "[h]e could not pass a test of basic skills necessary to qualify to continue service in the U.S. Marines and had to be discharged soon after enlisting." (Dec. 7.) Thus, it cannot be assumed that had he availed himself of the interview, the employee would have been offered the collector's position.

capacity assessment under § 35D the employee's physical ability to perform the collector's job yielded the right result, though for the wrong reason. Accordingly, the judge's decision awarding § 34A benefits and a § 8(5) penalty is affirmed.

Pursuant to § 13A(6), the self-insurer is to pay employee's counsel a legal fee of $1,407.15.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **February 28, 2007**