COMMONWEALTH OF MASSCHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 042099-00**

William Auclair	Employee
Marshalls	Employer
TJX Companies	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Maze-Rothstein)

APPEARANCES
Bruce S. Lipsey, Esq., for the employee
Joseph B. Bertrand, Esq., for the insurer

CARROLL, J. The insurer appeals from a decision awarding, in pertinent part, ongoing total incapacity benefits under G. L. c. 152, § 34, and a twenty percent penalty on the retroactive component of that award under § 8(5), for the insurer's unilateral termination of benefits. While the insurer contended that it discontinued benefits due to its offer of a particular suitable job, pursuant to §§ 8(2)(d) and 35D(3), the administrative judge found that the job offer did not comport with the statutory requirements. We conclude that the judge appropriately levied the penalty against the insurer. We affirm the decision for the following reasons as to the penalty issue, and summarily affirm the decision in all other respects.

The fifty-seven year old employee sustained a prior work-related herniated disc at L2-3, which resulted in surgery. After the employee returned to work as a manager in the shoe department, he experienced an onset of disabling back pain on October 26, 2000. The employee has treated with a number of physicians since that time. (Dec. 4-5.)

The insurer paid without prejudice for a period and then properly discontinued its without-prejudice payments under § 7. The employee filed a claim for § 34 temporary total incapacity benefits and, after a § 10A conference, the insurer was ordered to pay ongoing § 34 benefits. The insurer appealed to a full evidentiary hearing. (Dec. 2.) Prior

to the hearing date, the insurer terminated payment of those benefits, when the employee did not respond to a written job offer. (Dec. 7.) As of the time of the hearing, the employee's claims were for ongoing § 34 benefits, and a § 8(5) penalty for illegal discontinuance. The insurer defended on the basis of extent of incapacity, and denied that it had done anything wrong in discontinuing weekly benefits. (Dec. 2.)

The employee was examined by a § 11A impartial physician, Dr. Frederick Ayers. Dr. Ayers diagnosed the employee as having thoracic and lumbar strains, with underlying degenerative disc disease, causally related to his October 26, 2000 work injury. He restricted the employee from lifting more than ten pounds, and from bending, stooping, and squatting, and further stated that the employee would need to have the ability to sit and stand at will. Dr. Ayers opined that although the employee was not at a medical end result, he was capable of some gainful employment. However, Dr. Ayers also considered that the employee was being prescribed an excessive amount of pain medication, which could have a deleterious effect on his employability, due to its side effects of drowsiness and lack of mental acuity. The judge regarded the opinion of Dr. Ayers to be that, while the employee was capable of light sedentary work, that capacity would be effectively eliminated if his pain could not be controlled, or could be controlled only with excessive amounts of medication. (Dec. 5-6.)

The judge allowed additional medical evidence for the "gap" period prior to the § 11A medical examination. (Dec. 3.) Of the medical evidence introduced, the judge adopted the opinion of one of the employee's treating doctors, Dr. Michael Wagner. Dr. Wagner opined that the employee was totally medically disabled due to his extreme pain emanating from the October 26, 2000 work injury. (Dec. 7.)

The store manager, James Shainker, offered a job to the employee on May 2, 2002, based on the restrictions set out in Dr. Ayers' report. (Ex. 3.) The job offer generically identified "a position available for you within your restrictions of no lifting greater than 10 pounds, no bending, stooping, or squatting, and allowing you to stand and sit at will." (Ex. 3; Dec. 7.) The employee did not respond to the letter, and four weeks later the insurer unilaterally discontinued benefits being paid under the conference order.

(Dec. 7.) Mr. Shainker testified at the hearing that the position referenced in the letter was that of a cashier. (Dec. 8.)

The judge concluded that the insurer had illegally discontinued benefits, as the letter of May 2, 2002 did not constitute an offer for a "particular suitable job" under § 35D(3), and incorporated by reference into § 8(2)(d). (Dec. 8.) The judge concluded that the employee was totally incapacitated, due to his credible excessive pain, and awarded the employee ongoing § 34 benefits, with a twenty percent § 8(5) penalty on the retroactive benefits ordered from April 11, 2001 until the filing of the decision. (Dec. 9-11.)

General Laws c. 152, § 8(2)(d), allows an insurer to unilaterally terminate benefits, where

> [t]he 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 or subsection (4) of this section, the report of such examiner, and either of such reports indicates that the employee is capable of 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 a person employing said employee at the time of injury indicating that such a suitable job is open and has been made available, and remains open to the employee; . . .

Emphasis added. General Laws c. 152, § 35D(3), allows an employee's earning capacity to be established by 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." Moreover, G. L. c. 152, § 35D(5), defines "a suitable job or employment" 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."

The insurer's unilateral termination of benefits was illegal, because the written offer of suitable employment was not pursuant to § 35D(3): it was not for a "particular," i.e. "actual" job. A § 35D(3) job offer must be specific as to an actual job to be considered a bona fide offer. In Gulla v. Grieco Bros., Inc., 14 Mass. Workers' Comp. Rep. 300, 303 (2000), we reasoned that a bona fide job offer had to be "for an actual and available job. " See Mello v. Bristol County Sheriff's Office, 16 Mass. Workers' Comp. Rep. 376, 377 (2002)("available" under § 35D(3) described as "a real job with real duties and wages"). Prior to even getting to the question of "availability," however, the job offer must be for a "particular" job under § 35D(3). Thus, where a job offer is generic and does not identify a "particular," "available," and "actual" job, that offer does not pass muster under either § 35D(3) or the cross-referencing § 8(2)(d).[1] Therefore, the insurer was not within the unilateral termination provisions of the latter statute, and its action was unauthorized and illegal. The judge's conclusion to that effect was free of error. (Dec. 10) The award of a § 8(5) penalty was therefore proper. (Dec. 11.)

As to the insurer's other arguments on appeal, we summarily affirm the decision. However, we comment briefly on the insurer's contention that the judge substituted his own lay opinion of total incapacity for the impartial opinion that the employee could perform light sedentary work, despite the excessive pain medications he was taking. Contrary to the insurer's argument, the judge did not base his determination of total incapacity only on the effects of what the impartial doctor felt were excessive pain medications, (Dep. 17, 24, 25), but on the employee's credible testimony of his pain:[2]

> The fabric of the employee's work history is one in which he has performed well, and has worked concurrent employment at certain times in his life, from which I infer that but for the credible level of his pain at present, the employee would return to employment within the restrictions set by Dr. Ayers and offered by the employer.

[1] Testimony at hearing filling in the gaps of the offer by identifying a particular job does not retroactively cure the defect in the job offer and make the earlier illegal termination now legal.

[2] We note that the impartial physician also acknowledged that the employee was in substantial pain, (Dep. 32), and that his pain medications were not controlling his pain. (Dep. 14).

(Dec. 9. See also Dec. 4, 5, 6.) Where a judge credits an employee's complaints of disabling pain, we have upheld a finding of total incapacity, even in the face of an impartial opinion that the employee can work with restrictions. See Cugini v. Town of Braintree School Dept., 17 Mass. Workers' Comp. Rep. ___ (July 17, 2003); Delaney v. Laidlaw Waste Sys., 13 Mass. Workers' Comp. Rep. 72, 74 (1999); Anderson v. Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65, 68 (1990). We find no error in the judge's analysis here.

Accordingly, the decision is affirmed. We award the employee's attorney a fee, pursuant to § 13A(6), in the amount of $1,276.27.

So ordered.

_____
Martine Carroll
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge

Filed: **November 4, 2003**