

STATE OF MAINE  
WORKERS' COMPENSATION COMMISSION  
ONE VAUGHN PLACE  
CARIBOU, MAINE 04736

Mail Date: 10-1-92

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Re: Peter Piper v. United Parcel Service  
DOI: 4/26/84  
WCC File No.: 84017772  
Case No.: 84017772A

This decision may be appealed to the Appellate Division of the Workers' Compensation Commission, 24 Stone Street, Augusta, Maine 04333 within 20 days after receipt of notice of filing. See 39 M.R.S.A. Section 103-B.

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Peter Piper  
(Employee)

v.

United Parcel Service  
(Employer)

Liberty Mutual Insurance Company  
(Insurer)

On August 9, 1990 the Employee filed a Petition to Transfer to Suitable Work and on the same date filed a Petition to Redress Discrimination with respect to an April 26, 1984 date of injury. The Commission has considered the testimony of the Employee Peter Piper on two occasions as well as the testimony of Chris French on three occasions, Gail Grimes, and Terrance Hanlon. In addition the Commission has considered six Employee Exhibits and five Employer Exhibits as well as those items

submitted by Stipulation of the parties introducing office notes of Dr. David Jones, LINK Performance and Recovery Systems, work fitness evaluation, and Employer's Answers to Interrogatories. Also the deposition transcript of Michael Nadeau taken on May 26, 1992 has been considered by agreement of the parties. On two occasions Motions to Reopen have been granted and additional evidence already mentioned has been taken. The Employee injured his back on April 26, 1984. He was out of work a short time and returned to work on May 8, 1984. The Employee continued to work until 1988 when it became necessary to have lumbar disc surgery. Following attempts at physical therapy and various trial attempts to return to work the Employee was enrolled in what is known as the Temporary Alternate Work program. As a result he performed air delivery work commencing about March 19, 1990. The purpose of the Temporary Alternate Work program was as a work hardening program. Employees with injuries work within the program in the anticipation of returning to the job they had at the time of the injury. The number of employees required to perform the next day air mail varies. Under the collecting bargaining agreement regular existing parttime employees are guaranteed three hours a day and then are offered the extra duty of next day air driving. Since there are insufficient regular parttime workers extra employees are called in to perform the work. That is essentially the work that the Employee did from March 1990 until June 1990. During that time there were no complaints about his job performance. There was also no indication that he could not physically do the job which

he did. In a letter of May 2, 1990 Dr. Hersey indicated about the Employee "I doubt very much that he will be able to go back to doing his regular job as he had done four or five years ago." He went on to say "I do feel that he does have work capacity to be working in a modified capacity, lifting less frequently or less heavy objects or reduced hours per day." The job which the Employee had been doing in the temporary alternate work hardening program fit within those modified restrictions of Dr. Hersey. Once again it is noted that no complaints were made about his performance nor was he unable to perform the job when called upon to do so. United Parcel Service has a general policy that all employees must be able to lift up to 70 pounds. Once the Employer was informed by Dr. Hersey that the Employee might not be able to return to his previous job his position was terminated even though he had been performing that job. The Employer argues that the Employee was not discriminated against. However the evidence discloses that at least one other individual who had not been injured was hired off the street and has been performing that same job. Thus if one has had an injury and will not be able to return to his original job he is terminated while someone hired off the street without an injury doing the same job is retained. That is the case here. If all the workers doing the same job were injured and terminated when it was determined they couldn't return to their original job the Commission would have no problem. In this case an injured worker was terminated while at least one other worker off the street was retained. With respect to the Petition for Transfer to Suitable Work the Employer argues that there is no

position available. The Employee was already in a position that was available which he could do. The Employer argues that the Employer has no obligation to transfer the Employee to suitable work because he had reached maximum medical improvement over a year prior to this decision. The Petition for Transfer to Suitable Work however was filed well within the year after the determination of maximum medical improvement. The Employer further argues that the collective bargaining agreement prohibited the Employee from remaining in that job that he was performing. The Commission finds that that is not so. After an extensive evaluation of the evidence including a reading of the collective bargaining agreement, there is nothing whatsoever to prevent the Employee from performing the work he was doing when terminated. The essential issue in this case is that a policy of the Employer is contrary to the legislative intent of Section 66A of the Workers' Compensation Act. The Commission finds that the Employer violated Section 111 of the Workers' Compensation Act. The Employee is entitled to be paid the difference between what he has received as workers' compensation and what his net wages lost are. Insufficient evidence was submitted to determine that amount and if the parties cannot so agree the Commission retains jurisdiction to take further evidence on that issue to make a determination. Additionally the Employee is entitled to be transferred to the same job from which he was terminated on June 30, 1990 on days when that work is available and before hiring any one else off the street. Both the

Peter Piper

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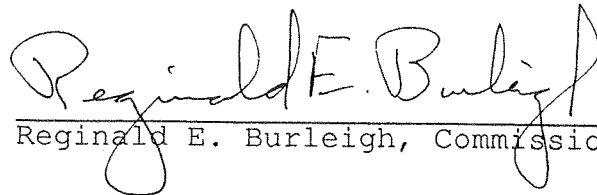
Petition to Redress Discrimination and the Petition for Transfer  
to Suitable Work are granted.

SO ORDERED.

Caribou, Maine

WORKERS' COMPENSATION COMMISSION

Dated: 9-30-92

  
Reginald E. Burleigh, Commissioner

A true copy

ATTEST



WCC CLERK