COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009532-97**

Arnold Chinetti	Employee
Boston Edison Company	Employer
Liberty Mutual Insurance Company	Insurer

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

APPEARANCES
Michael J. Powell Jr., Esq., for the employee
Dennis M. Maher, Esq., for the insurer

MAZE-ROTHSTEIN, J. The insurer's appeal presents the following question: when an employee has accepted an early retirement package from his employer is he still entitled to weekly incapacity benefits under the Act. We hold that voluntary retirement does not bar an employee from receiving weekly workers' compensation benefits where an industrial injury caused the retirement.

Arnold Chinetti, who was sixty-three years old at the time of hearing, injured his left knee on June 21, 1967 stepping off the back of a truck while working as a "lamp man" for Boston Edison. Lamp men use bucket and/or ladder trucks to repair and replace street fixtures. Mr. Chinetti subsequently underwent surgery to remove torn cartilage. He was out of work for approximately three months during which he received workers' compensation benefits. Thereafter, he returned to full duty although his knee continued to be intermittently painful, particularly when kneeling. (Dec. 3-4.)

In 1989, after experiencing swelling, increased pain, problems with kneeling and squatting and difficulty climbing in and out of the bucket at work, the employee sought medical treatment and ultimately underwent arthroscopic surgery on his left knee. He

remained out of work for two months following the surgery and was again paid workers' compensation benefits. Upon returning to work he felt his knee had improved over its pre-surgery condition, but he still had pain in certain weather conditions and getting in and out of his work bucket continued to be difficult. (Dec. 4.)

Around April of 1995, Mr. Chinetti had episodes of increased left knee swelling. He also started having trouble walking, kneeling and squatting. Around the same time, in May of 1995, a revision of the collective bargaining agreement governing his work changed his job specifications, so that he was now required to handle and replace large streetlight fixtures.[1] (Dec. 4.)

Over the course of the next six months his left knee condition deteriorated further. Accommodating this physical change, the employee's supervisor assigned him to his prior lighter tasks. This job duty improvement was short-lived because, on October 25, 1995, he was again assigned to the new heavier work. Mr. Chinetti performed the job in extreme pain. He reported his increased pain to his supervisor and sought medical treatment the following day at the employer's clinic where he was observed to be limping with a swollen left knee. He was placed on restricted duty. A follow-up visit on November 2, 1995 showed no change in his symptoms. (Dec. 4-5.)

From November 1, 1995 until January 1, 1996, Mr. Chinetti was assigned to two different light duty jobs both of which he had difficulty performing. (Dec. 5.) On January 1, 1996 he elected to take an early retirement package offered by the employer. Under the plan, a retiring employee could receive six months severance pay plus a choice of a pension or a lump sum payment in lieu of a pension. Mr. Chinetti chose the lump sum option, receiving $286,000.00 in addition to his six months severance pay. (Dec. 6.) Since his retirement, the employee underwent total left knee replacement. Presently, although he describes his knee as improved over its condition prior to the latest surgery, his knee gets sore with activity, stair climbing, prolonged walking, kneeling and getting in and out of cars. (Dec. 5.)

[1] Previously, his work was limited to changing smaller bulbs, fixing wiring or replacing small photocells. (Dec. 4.)

In 1997, the employee filed a claim for benefits alleging incapacity and a need for medical treatment related to his 1967 industrial injury. The claim was the subject of a § 10A conference and was denied. The employee appealed to a hearing de novo. (Dec. 2.) Pursuant to § 11A,[2] the employee was examined by an orthopedic doctor who rendered a diagnosis of torn medial meniscus with subsequent development of post-traumatic arthritis, all causally related to his 1967 work injury. The physician further opined that the employee was unable to perform work requiring long periods of standing or kneeling, squatting, lifting or climbing. (Dec. 6-7.) Neither party deposed the doctor and his opinions were adopted by the judge. (Dec. 2, 9.)

In his decision the hearing judge found the employee's wage loss and election to retire to have been due to his injury-related incapacity and not merely attributable to an independent decision to retire. He awarded ongoing § 35 weekly partial incapacity benefits commencing January 1, 1996.[3] (Dec. 11.)

The insurer presents four arguments for reversing the administrative judge's award of benefits, one of which merits discussion. The insurer begins its argument with the maxim that workers' compensation is a wage replacement system for employees who suffer wage loss as the result of a work place injury. (Ir. Brief, 3.) It then submits that the employee's wage loss was occasioned by his election to take the early retirement plan offered by his employer and its incentive payment for voluntarily leaving the work force. For support, the insurer points to the employee's testimony, acknowledged by the judge, that on October 20, 1995, five days before performing the heavier work, he executed a form giving his employer notice of his intention to retire effective January 1, 1996 and that on October 29, 1995, the employee executed another form notifying his employer of

[2] General Laws c. 152, § 11A gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other material medical evidence to meet it unless the judge finds the additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. O'Brien's Case, 424 Mass. 16 (1996).

[3] The judge increased the award to § 34 benefits from the day of the employee's total knee replacement surgery, December 10, 1996 through April 4, 1997. (Dec. 12.)

his voluntary election to participate in the early retirement program. (Ir. Brief, 4-5, citing, Dec. 6; Tr. 36, 37, 39.)

The insurer's argument falls short. The employee does not deny that he took advantage of the employer's early retirement incentive. Rather, the issue for decision was whether the employee satisfied his burden of proof tying his early retirement to his industrial injury work impairment.

The insurer argued that but for his election to retire early, the employee would be earning his full wages. After considering all the evidence, the administrative judge found the employee's explanation of his early retirement persuasive. The judge stated:

> I find that Mr. Chinetti reached the point that his knee condition would no longer allow him to work at his regular job (or even full-time at lighter duty offerings from Boston Edison) right about the same time an early retirement incentive was made available. I find the only reason the employee was even able to continue reporting to work up to the January 1, 1996 effective date of his retirement was that, for the final six weeks, nothing was asked of him.
>
> I believe and credit Mr. Chinetti's testimony that the reason he opted to take advantage of the retirement incentive was his feeling that he could no longer do his job . . . . He became unable to work as he did before due to his industrial injury.

(Dec. 9-10.)

Thus, in the end, the judge credited the employee's explanation, thereby rejecting the insurer's theory that only the generous retirement benefits caused him to retire. The issue of credibility is solely for the hearing judge to decide; the reviewing board, generally, cannot tamper with such decisions. Lettich's Case, 403 Mass. 389, 394 (1988); Ighodaro v. All-Care Visiting Nurse Association, 12 Mass. Workers' Comp. Rep. 415, 417 (1998). See also Trombetta's Case, 1 Mass. App. Ct. 102, 105 (1973)(the board was warranted in finding that on the day the employee was laid off, "he had reached the end of his capacity to work"). On the facts here, the finding that the work injury caused the employee to accept an early retirement, (Dec. 11), is sound and wholly permissible under the Act. Clearly, the fact of receipt of private pensions or retirement benefits that

are generally cumulatively earned during one's work life, does not preclude receipt of workers' compensation except in the instances outlined in § 35E, which is inapposite here. See G.L. c. 152 § 35E; 9 A. Larson, Workers' Compensation Law § 97.51 (1997).

The decision of the administrative judge is affirmed.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: October 25, 1999