COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 028889-90**
Michael J. Peters	Employee
Raytheon Company	Employer
Liberty Mutual	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
Kevin S. Sullivan, Esq., for the employee
Joseph J. Durant, Esq., for the insurer

MCCARTHY, J. Michael J. Peters, the employee, is forty-one years of age, married and the father of three dependent children. (Dec. 3.) He has a bachelors degree from Framingham State College. Prior to coming to work at Raytheon, as a security guard in April 1987, Peters worked as a police officer. (Dec. 3.) In 1988 or 1989 Mr. Peters injured his left knee in a non-work related accident. Following arthroscopic surgery and a period of incapacity, the employee returned to his security guard position at Raytheon.[1] (Dec. 4.)

On May 31, 1990, while in the course of his employment, Mr. Peters slipped and fell on his left knee. He experienced sharp pain and swelling in the knee. His supervisor sent him to the hospital for treatment. (Dec. 4.) In August 1990, the employee underwent an arthroscopic debridement of that knee. In January 1991, Peters returned to sedentary work at Raytheon as a security receptionist. (Dec. 5.)

Several promotions later, Mr. Peters found himself as a senior security specialist. This " was a desk job which required very little walking or climbing . . . ." (Dec. 5.) The

[1] Mr. Peters was paid long term disability benefits while recovering from the injury.

employee had no difficulty performing his job-related duties. He continued to treat intermittently with his doctor. (Dec. 5.)

In 1998, the insurer, who had accepted the claim and paid weekly benefits, filed a complaint to terminate or modify these benefits.[2] The insurer's request was denied after a § 10A conference. The insurer's appeal returned the case to the same administrative judge for a hearing *de novo*. (Dec. 1.) After his appointment as the impartial medical examiner under § 11A, Dr. Howard P. Taylor examined the employee on July 21, 1998. (Dec. 6.) His medical report and deposition testimony are part of the record in this case. (Dec. 3.)

Doctor Taylor opined that the employee was partially medically disabled due to chondromalacia of the left knee, a degenerative condition. Doctor Taylor believes that this condition is not causally related to the 1990 workplace accident. He recommended that Peters restrict his walking and avoid climbing and kneeling. (Rep. of § 11A examiner, 2; Dec. 6.)

The administrative judge allowed the employee's motion to introduce additional medical evidence due to inadequacy of the § 11A opinion, (Dec. 7), and the medical report of Dr. Joseph R. Rokous, was submitted by the employee. This was the only other medical testimony entered into evidence. (Dec. 7.) Doctor Rokous agreed that the employee had a significant loss of function in his left knee and should avoid climbing, kneeling and squatting. In contrast to Dr. Taylor, Dr. Rokous believed that the work incident aggravated the employee's chondromalacia to the point of partial medical disability. (Rep. of Dr. Rokous, 2; Dec. 7.) Finding the medical opinions of both physicians similar with regard to "the condition of the employee's left knee and the limitations imposed," (Dec. 7-8), the administrative judge adopted both opinions as to "the degree of impairment suffered by the employee." (Dec. 8.) On the issue of causal

[2] When injured in 1990, the employee's average weekly wage was $917.02 because he worked a great deal of overtime. In January 1998 he was earning $638.00 per week and receiving partial incapacity benefits under § 35.

relationship, the judge adopted Dr. Rokous' opinion over that of the § 11A examiner. (Dec. 8.)

The administrative judge then turned to the employee's earning capacity. (Dec. 8.) He found that the pre-injury position of security guard enabled the employee to earn approximately $400.00 per week in overtime while the sedentary jobs performed upon his post-injury return to Raytheon did not provide overtime opportunities. (Dec. 8.) The judge credited the employee's testimony that individuals with more seniority than he had been laid off from security guard positions. (Dec. 9.) Additionally, the judge found that the evidentiary record did not indicate that security guards at Raytheon were in fact working overtime in 1998. (Dec. 9.) The judge determined that the diminution in the employee's current earnings resulted from economic factors rather than his medical restrictions. (Dec. 11.) Perhaps most important, the judge found that the employee failed to prove that he was unable to perform his former work as a security guard. The judge set out his finding thus:

> More important, the evidence does not persuade me that the employee was incapable of working as a security guard at any time material to this proceeding. There was scant evidence as to the physical requirements involved in the position of a security guard. Adopting the medical opinions of the two doctors with regard to his physical limitations, I conclude that the employee should refrain from climbing stairs and inclines, kneeling, squatting, and should restrict the amount of walking he does. The record does not demonstrate that these restrictions prevent the employee from performing the regular duties of a security guard.

(Dec. 9, 10.)

On the strength of these findings, the judge allowed the insurer's request to discontinue the payment of § 35 weekly benefits as of the date of the impartial exam, July 21, 1998. (Dec. 11-12.) The employee appeals.

First, the employee contends that the judge erred in applying Kelley v. General Elec., 12 Mass. Workers' Comp. Rep. 476 (1998). (Employee's brief, 6.) We disagree. In Kelley, we affirmed an administrative judge who denied § 35 benefits where the employee failed to establish that the reduction in wages was caused by the injury as

opposed to economic conditions. Id. at 478-479. Here, the judge determined that the employee "failed to persuade [him] that the difference between his 1990 earnings and the wages he was earning in 1998 were caused by his injury, rather than by economic factors affecting Raytheon. See Kelley vs. General Electric, 12 MWCR at 478." (Dec. 10.) There was no error in the judge's application of what was said in Kelley, supra, to this case. (Dec. 11.)

The employee also contends that it was error for the judge to find that the employee was capable of performing the duties of a security guard. (Employee's brief, 8.) With regard to the duties of a security guard, the judge pointed out that "[t]here was scant evidence as to the physical requirements involved in the position . . . ." (Dec. 10.) In response to a direct question regarding the duties of a security guard, the employee simply stated that you would have to walk "rounds." (Tr. 15.) Without elaboration, the employee testified that the security guard position was more physical than his current sedentary position and might require an individual to work outdoors. (Tr. 21.) No further evidence regarding the physical demands associated with the security guard position was presented. The employee bears the burden of proving the essential elements of his case. Ginley's Case, 244 Mass. 346, 347-348 (1923); Phillip's Case, *supra* at 618. Here, the employee failed to offer sufficient evidence to demonstrate that the physical restrictions imposed would prevent him from performing the actual duties of a security guard. While the sparse amount of evidence describing the physical duties of a security guard might support the inference that Mr. Peters could not do the work, it certainly did not compel such a finding. The judge was simply not persuaded that Mr. Peters was incapable of working as a security guard. (Dec. 9.) The evidentiary record supports the judge's conclusion.

The employee's final contention is that the evidence does not support the termination date selected by the judge. (Employee's brief, 10.) The date used by the judge to terminate weekly benefits was the date the impartial examination took place. Where the impartial examiner had expressed a medical opinion as to the employee's

condition on that date and the opinion was properly admitted into evidence, the date of the examination has evidentiary significance. Betty v. Olsten Health Care, 12 Mass. Workers' Comp. Rep. 311, 313 (1998). It was not wrong for the judge to use that date to terminate benefits.[3]

The decision of the administrative judge is affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **August 16, 2000**

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Sara Holmes Wilson
Administrative Law Judge

Smith, J. concurring in part and dissenting in part. I would recommit the case for further factual findings, as the decision fails to provide assurance that the judge properly applied the law to facts that are grounded in the record evidence.

First, the judge found that the employee's walking ability was limited. (Dec. 10.) Then the judge made a specific finding that "there was no showing that the employee could not perform his prior work within the physical restrictions left from his injury." (Dec. 10-11, emphasis supplied.) To the contrary, the employee testified that his security guard job required walking rounds. (Tr. 15, 21.) He further testified that, with his limitations, the employer would not permit him to work as a security guard. He was instead assigned lighter work in the administrative security office, where he became a security regulation clerk. (Tr. 17-18.) Although the judge does not have to believe the employee's testimony about the requirements of his pre-injury job and his employer's refusal to allow him to perform it, the judge may have overlooked it. In this circumstance, it is appropriate to recommit the case for further findings on the question.

[3] We note that the judge could have used earlier evidentiary-based dates that would have been less advantageous to the employee.

Second, the employee contends that the date of termination is arbitrary and capricious, as there was no change in his medical condition at that time. The insurer, by appealing the conference order for continuing compensation, placed in controversy the nature and extent of the employee's incapacity from at least the date of the conference denial. Conroy v. Norwood Hospital, 11 Mass. Workers' Comp. Rep. 487, 488 (1997); decision after recommittal, 14 Mass. Workers' Comp. Rep. (June 2000). Absent an agreement among the parties, which did not exist here, the date chosen by the judge to terminate benefits must be based on some change in the employee's medical or vocational condition. Monet v. Massachusetts Respiratory Hosp., 11 Mass. Workers' Comp. Rep. 555 (1997). We have said: "It is the administrative judge's duty to address the issue of the employee's incapacity up to the date of the impartial physician's examination in a manner that will enable the reviewing board to determine with reasonable certainty whether correct rules of law have been applied to that facts that could properly be found." Slight v. Hyannis House Apartments, 13 Mass. Workers' Comp. Rep. 198, 210-202 (1999). The decision lacks such findings.

For these reasons, it is appropriate to recommit the case to the administrative judge for further findings of fact regarding the nature and extent of the employee's incapacity from May 27, 1998, the date of the conference order in this proceeding. I would so order.

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Suzanne E. K. Smith
Administrative Law Judge