COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 027222-97**

Raymond Knapp	Employee
American Security Command Force, Inc.	Employer
Casualty Reciprocal Exchange	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Levine)

APPEARANCES
James M. Manitsas, Esq., for the employee
Joseph B. Bertrand, Esq., for the insurer

CARROLL, J. Raymond Knapp appeals a finding of an administrative judge that § 35B does not apply to his claim and that as of June 1999, the employee had the capacity to work at "at least a minimum wage level job." We find it appropriate to recommit the case for the administrative judge to make findings about the number of days the employee was initially incapacitated and thus to reconsider whether § 35B applies.

Mr. Knapp was 41 years old at the time of hearing. On July 27, 1997, while working as a security guard at an enclosed car lot for the employer, the employee injured both arms and his neck when a gate he was pushing suddenly stopped and came off the roller onto his arms. (Dec. 2.) After being seen that day at Baystate Medical Center, he stayed out of work for a few days before returning to light duty status, meaning that he did not have to close doors or gates. Id.

By the spring of 1998 the employee's right arm still hurt and he noticed swelling in his fingers. He sought further medical treatment with a chiropractor. Id. Despite continued pain and swelling, the employee continued to do his job with accommodations until December 23, 1998, at which point he stopped his security

guard job as well as a second job he had begun in September 1998 as a bus monitor. (Dec. 3.)

Following the denial of his claim at a § 10 conference, the employee appealed to a hearing de novo.

Dr. Allan Bullock, the impartial physician who examined the employee on June 1, 1999, pursuant to § 11A, diagnosed tendinitis of the shoulder related to the work injury and placed restrictions on the employee's activities of not working above shoulder height and not doing any repetitive type work with his shoulder. Id. The administrative judge adopted these restrictions but concluded that even with the restrictions outlined by Dr. Bullock, Mr. Knapp could, as of the time of the impartial examination, earn at least a minimum wage, thereby exceeding his average weekly wage of $239.00. (Dec. 4.)

Turning to the issue of whether § 35B applies to this employee's claim we determine that it is appropriate to recommit for further findings.[1] Section 35B reads:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury whether or not such injury is determined to be a recurrence of the former injury . . . .

If the employee was furnished § 30 medical and hospital services only, then § 35B does not apply. See Russo v. General Elec. Co., 8 Mass. Workers' Comp. Rep. 52 (1994). We look then to whether Mr. Knapp also had incapacity for which he received compensation. Although the employee at hearing was not seeking incapacity benefits until December 4, 1998, (Tr. 5), he testified that he had, in fact, initially been

[1] If § 35B applies, the judge would have to consider the stipulation by the parties that the employee's average weekly wage from concurrent employment, as of December 23, 1998, when he stopped working two jobs, was $351.20, (Tr. 24, Dec. 1), in computing the § 34 rate awarded and in determining whether the employee could thereafter earn his average weekly wage.

out of work approximately six days and was paid for one day of the incapacity. (Tr. 26.)

General Laws c. 152, § 29, states in pertinent part:

> No compensation pursuant to section thirty-four or thirty-five shall be paid for any injury which does not incapacitate the employee from earning full wages for a period of five or more calendar days. . . . If incapacity extends for a period of at least five but less than twenty-one days, compensation shall be paid from the sixth day of incapacity.

If the employee had in fact received incapacity benefits, i.e. compensation, and the other undisputed elements of § 35B are present, then § 35B would apply.[2] The administrative judge makes inconsistent findings in this regard. He finds that "[the employee] was out of work for a few days. When he returned to work in early August his arm still hurt . . . ." (Dec. 2.) Later in the decision the administrative judge concludes that "§ 35B does not apply, as [the employee] was not an employee who 'had been receiving compensation under this chapter' as he did not lose time from work until December of 1998." (Dec. 4.) In fact, the employee's testimony was that he was out approximately six days from work immediately after the July 27, 1997 industrial injury and was paid for one day of compensation by the insurance company, (Tr. 26),[3] and that he went back to work during that first period of incapacity around August 6, 1997. (Tr. 14.) If the employee were out six days, he would have been paid for only one. See § 29. Nonetheless, that would be incapacity for which he received compensation.

On recommittal, the administrative judge must make findings on the employee's testimony about the number of days he was initially incapacitated. If the

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[2] Don Francisco's Case, 14 Mass. App. Ct. 456, 460 (1982) ("[Section] 35B . . . has application only to employees who are injured not less than two months following the date of their return to work after being unemployed because of a compensable injury").

[3] The employee's testimony is consistent with the insurer's view in its opening statement -- "[h]e did go out and I think was paid for one day. I think he was out six days, so that short period rule." (Tr. 6.) The "short period rule" appears to be a recognition of § 29 quoted above.

administrative judge finds that the employee was incapacitated six or more days and paid for even one, then § 35B applies. We affirm the judge's finding that the employee could work at "at least a minimum wage level job" as of June 1999, but on recommittal, if § 35B applies, the judge will have to make a specific finding as to the employee's capacity to earn the higher § 35B wages; if the judge finds the employee's earning capacity to be less than the § 35B wages then § 35 partial incapacity benefits would be due.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **April 17, 2001**
MC/jdm