COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 045759-96 044479-97**

Ronald Strescino	Employee
Cyrk, Inc.	Employer
Liberty Mutual	Insurer

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

APPEARANCES
Peter Georgiou, Esq., for the employee
Joseph J. Durant, Esq., for the insurer

LEVINE, J. The employee appeals from a decision terminating weekly incapacity benefits for an accepted work related knee injury. The employee argues that the termination was without an evidentiary basis. We agree that the judge failed to adequately explain his reasons for discontinuing the employee's weekly incapacity benefits. We therefore recommit the case for further findings on the extent of the employee's incapacity.

The sixty-four year old employee worked for Cyrk, Inc., a company that prints designs on T-shirts; the employee prepared materials and transported stock, such as drums of ink and boxes of shirts. He spent most of his time on his feet. (Dec. 4.) The employee injured his back, left shoulder and left ankle on November 8, 1996, when he slipped between a loading dock and a truck. The employee was out of work for several months, during which time he collected workers' compensation benefits. (Dec. 5.) The employee returned to work in April 1997, performing virtually the same duties as he had prior to his injury. (Dec. 5-6.) On July 23, 1997, the employee injured his right knee when he caught his foot in some pallets. The employee sought treatment, but, on the advice of his doctor, he returned to work after a couple of days. He thereafter worked until his planned retirement on August 8, 1997. (Dec. 6.) In October 1997, the employee saw his orthopedic physician, Dr. Kenneth Gregg, who recommended arthroscopic

surgery for his knee injury. Dr. Gregg performed the surgery on November 25, 1997. On December 17, 1997, he released the employee for full, unrestricted activity. Id. Dr. Gregg then saw the employee on a follow-up visit in February 1998. He placed no restrictions on the employee's activities. The employee had no treatment after February 1998. (Dec. 7.)

The employee filed a claim for workers' compensation benefits. A conference order awarded a closed period of § 34 benefits. The employee appealed to a full evidentiary hearing. (Dec. 1.) The insurer accepted liability for the knee injury, but opposed any weekly compensation benefits. (Dec. 2.) On May 12, 1998, the employee underwent a § 11A impartial examination. (Dec. 8.) The impartial physician diagnosed an injury to some cartilage and to the employee's anterior cruciate ligament (ACL), as well as a tear to his medial meniscus, all causally related to the work injury of July 23, 1997. The doctor opined that the meniscus tear had been treated successfully, but that the damage to the ACL and cartilage persisted. Id. The doctor opined that the employee was capable of working, but that he should avoid squatting, bending or lifting; he should limit his stair climbing, and should not stand more than four hours a day. The impartial physician noted that the employee's back and shoulder injuries, which the doctor did not examine, could be more serious than the knee injury. Id.

The judge allowed the employee's motion to join a claim for the injuries to his back and shoulder stemming from his industrial accident of November 8, 1996. (Dec. 1-2, 8-9.) The insurer denied liability for those injuries. (Dec. 2.) The judge ruled that the impartial report was inadequate as to the back and shoulder injuries, and therefore allowed the parties to introduce additional medical evidence. Id. The employee submitted reports of his orthopedic physician, Dr. Gregg. (Dec. 9.) The insurer submitted two reports of its medical examiner, Dr. Charles Brennan. (Dec. 10.) Dr. Brennan opined that the employee was partially disabled from his back, shoulder and knee injuries as of his examination on August 12, 1997. The doctor opined that the employee was partially disabled with regard to heavy lifting, overhead work, squatting and kneeling as a result of the November 1996 and July 1997 industrial injuries. (Dec.

10-11.) The judge adopted Dr. Brennan's opinion of partial disability as of August 12, 1997. (Dec. 11.) The judge also adopted the opinion of the impartial physician that as a result of the July 1997 industrial injury to the employee's knee, as of May 12, 1998, the employee "was capable of light manual work, but could not engage in repeated squatting, bending or lifting . . . and that the employee should not be on his feet for more than four hours in a workday, and should avoid or limit his stair climbing." Id. The judge noted that the employee testified at hearing as to the unchanged nature and extent of his pain in his left shoulder; in addition, the employee had occasional pain in his knee and he wore a knee brace. (Dec. 7.)

The judge concluded that the employee had suffered work injuries to his back, left shoulder and right knee; he found that the knee and shoulder conditions combined to partially incapacitate the employee from August 9, 1997 (the day after his retirement) until November 24, 1997 (the date of his knee surgery). (Dec. 13-14). The judge assigned a weekly earning capacity of $140.00 during this time period. (Dec. 14.) From November 25, 1997 until December 17, 1997, the judge found that the employee was totally incapacitated. From December 18, 1997 through the date of the hearing, December 11, 1998, the judge again awarded partial incapacity benefits, based on a $140.00 weekly earning capacity. (Dec. 14.)

The judge terminated the employee's weekly benefits as of the date of the hearing. The judge explained the termination as follows:

> As of the time of the hearing, I find that the employee was capable of earning wages equal to or greater than his average weekly wage of $277.42 per week. He was not in any active therapy, and had not seen a doctor for treatment since February, 1998. He found it difficult to walk or stand for extended periods of time, but this was his only real physical restriction related to any of his work injuries. The employee was not completely credible at the hearing, and I find that he exaggerated his level of pain and the degree of his physical limitation.

(Dec. 14-15.) The judge therefore terminated the employee's weekly incapacity benefits as of the December 11, 1998 hearing date. (Dec. 15-16.)

The employee argues that the judge's termination of benefits cannot stand because it contradicts the adopted medical evidence. We agree.[1] We must be able to look at the judge's subsidiary findings and understand the logic behind the judge's conclusions. Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993); Howe v. Rocky Meadow Cranberry, 9 Mass. Workers' Comp. Rep. 704, 706 (1995). The judge has not provided a sufficient explanation in the subsidiary findings as to why the opinions of both the impartial physician and Dr. Brennan -- apparently persuasive as to the employee's medical restrictions beginning December 18, 1997 and continuing beyond May 12, 1998, the date of the impartial examination -- suddenly do not apply as of the December 11, 1998 hearing. For example, the judge, in support of termination of weekly benefits, cites the absence of treatment by the employee since February 1998; however, the employee was likewise not in active treatment in May 1998 when he was examined by the impartial physician, who imposed restrictions which the judge adopted. (Dec. 11.) The judge also stated that the employee's only real physical restriction related to his work injuries was difficulty to walk or stand for extended periods of time. Yet, the work related restrictions recommended by the impartial physician and adopted by the judge also included that the employee should not engage in "repeated squatting, bending or lifting." (Dec. 11.) And the doctor's restrictions as to bending and squatting were based on physical findings. (Dep. 16.) Furthermore, the impartial physician found that the employee had permanent damage to the articular cartilage. (Dep. 14.)[2] Therefore, "[b]ecause we are unable to devine [sic] the basis for [the termination of benefits], we

[1] The insurer appears to concede that the hearing date is an inappropriate date to terminate incapacity benefits. (Insurer br. 3.) But see Rossi v. Mass. Water Resources Authy., 7 Mass. Workers' Comp. Rep. 101, 102 (1993)("the day of the hearing . . . may well be an appropriate date for discontinuance of benefits, if the judge found from observation of the employee that he was then capable of earning his former wage"); Stone v. Belchertown State School, 13 Mass. Workers' Comp. Rep. 242, 244 (1999)("the judge did not find persuasive [the employee's] testimony about her limitations and her pain because of inconsistencies between her testimony regarding the use of her cane and his observations as to the lack of wear on the cane").

[2] We also note that the judge did not find any change in the employee's vocational profile as of the hearing date to support an increase in the earning capacity. The employee's work experience seemed to be of a heavier nature. (Dec. 4, 14; Employee Ex. 1.)

remand. The judge should review the evidence and make findings consistent with and supported by that evidence." Gambale v. Massachusetts Gen. Hosp., 10 Mass. Workers' Comp. Rep. 633, 635 (1996), citing Bursaw v. B.P. Oil Co., 8 Mass. Workers' Comp. Rep. 176, 179 (1994). Due to the passage of time, the judge may take additional lay and medical evidence.[3]

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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[3] At hearing, the insurer argued that, because the employee voluntarily retired, he was precluded from claiming weekly incapacity benefits. (Dec.2.) The judge found against the insurer on that issue. (Dec. 12-13.) Since the insurer did not cross appeal, it cannot have the issue revisited on recommittal. Compare Aetna Cas. & Surety Co. v. Continental Cas. & Surety Co., 413 Mass. 730, 734 & n.4 (1992). On the merits of the insurer's argument, see, for example, Chinetti v. Boston Edison Co., 13 Mass. Workers' Comp. Rep. 328, 331 (1991)(voluntary retirement does not bar an employee from receiving weekly workers' compensation benefits where an industrial injury caused the retirement).