COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 020396-19 038451-19**
Alice Delannoy	Employee
Lighthouse School, Inc.	Employer
New York Marine and General Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Fabiszewski, Fabricant and Long)

The case was heard by Administrative Judge Bean

APPEARANCES
G. Gregory Howard, Esq., for the employee at hearing and on appeal
Austin T. Powell, Esq., for the insurer at hearing and on appeal
Justin P. Starr, Esq., for the insurer on appeal

FABISZEWSKI, J. The insurer appeals from the administrative judge's decision awarding the employee § 34 temporary total incapacity benefits followed by a period of § 35 temporary partial incapacity benefits and § 30 medical benefits.[1] On appeal, the insurer raises two issues: 1) whether the administrative judge's ruling allowing the employee's oral amendment to her claim after the conference was arbitrary and capricious; and 2) whether the administrative judge's denial of the insurer's request to depose the § 11A physician was arbitrary, capricious and violative of the insurer's due process rights. Because we find merit in both of the insurer's arguments, we vacate the administrative judge's decision and recommit the case for a hearing de novo.

[1] The administrative judge ordered the insurer to pay § 34 temporary total incapacity benefits in the amount of $589.90 per week from May 4, 2021, to the date seven days after the completion of a work conditioning program, or 90 days from the beginning of a work conditioning program, or 120 after the issuance of his decision, whichever date comes first, followed by § 35 temporary partial incapacity benefits in the amount of $418.80 based on an earning capacity of $285.00 per week.

The facts pertinent to the issues raised on appeal are summarized below.[2] On January 16, 2019, the employee injured her right knee while working for the employer as a regulation support technician assisting students with emotional and behavioral issues. (Dec. 828.) She continued to work in a light duty capacity until July 2019, when she underwent right knee surgery. (Dec. 829.) After her surgery, she returned to work in a light duty capacity in mid-August, eventually working near full duty in October 2019. Id. Despite increasing pain, she continued to work until May 4, 2021, when her treating physician, Samuel Gerber M.D., advised her to discontinue working and recommended a total knee replacement, which she underwent in July 2021. Id.

On May 6, 2021, the employee filed a claim seeking § 34 benefits, or, in the alternative, § 35 benefits, for a closed period of time, from May 4, 2021, to May 4, 2022, plus benefits pursuant to §§ 13, 13A and 30. Rizzo, supra. On July 21, 2021, the administrative judge issued an amended order awarding § 34 benefits for the closed period claimed by the employee, as well as benefits pursuant to §§ 13, 13A and 30.[3] Id. The insurer filed a timely appeal.[4] Id. Pursuant to § 11A(2), the employee was examined by Mark Berenson, M.D., on October 25, 2021. (Dec. 826.) On January 7, 2022, the

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[2] Although there are two Board files listed in this appeal (Board No. 020396-19 and Board No. 038451-19), there is only one date of injury: January 16, 2019. Board No. 020396-19, which lists the date of injury as January 16, 2019, was created in 2019 when the insurer filed an initial Notification of Payment (Form 103). Board No. 038451-19 was created when the employee listed an incorrect date of injury on a Form 110, Employee's Claim. At hearing, the parties stipulated that the correct date of injury is January 16, 2019. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file.) Hereinafter, to minimize confusion, any additional claims, motions or other activity involving the employee's January 16, 2019, injury should be filed under Board No. 020396-19.

[3] Per request of the employee, an amended conference order was issued to correct the original conference order, which awarded benefits from May 4, 2021 to May 4, 2021. Rizzo, supra.

[4] In his decision, the administrative judge incorrectly states that the employee filed an appeal of the amended conference order. However, the DIA board file contains only one appeal of the conference order, which was filed by the insurer. Rizzo, supra. This error in the judge's procedural analysis may have set the stage for the larger error that resulted from the judge believing the employee had preserved the right to take issue with the conference order.

parties filed a Joint Pre-Hearing Memorandum, in which the employee claimed § 34 benefits for the period "5/04/21 to P&C.". Rizzo, supra.

On March 2, 2022, both parties filed hearing memoranda in anticipation of the hearing, which was originally scheduled for March 8, 2022. Rizzo, supra. In her hearing memorandum, the employee requested benefits pursuant to § 34, and in the alternative, benefits pursuant to § 35, from May 4, 2021, to present and continuing, plus benefits pursuant to §§ 13A and 30. Id. In its hearing memorandum, the insurer raised several defenses, including proper claim. Id. The parties appeared on March 8, 2022, but the hearing did not proceed that day. (Dec. 826; Ins. br. 3; Employee br. 3.) Both parties agree that there was a discussion regarding the employee's claim, but the details of the discussion are unknown. (Ins. br. 3; Employee br. 3.) No transcript was made of the meeting, and each party has offered differing versions of what was discussed. (Rizzo, supra, Ins. br. 3; Employee br. 3.) After this proceeding, however, the insurer filed a written objection raising the issue of "proper claim," noting that the employee's hearing memorandum sought benefits beyond those listed in her initial claim. Rizzo, supra. The hearing was rescheduled to April 26, 2022. (Dec. 826.)

At the hearing held on April 26, 2022, the employee made an oral motion to amend the conference order issued on July 21, 2021, to reflect an award of benefits beyond May 4, 2022, the termination date listed in both her initial claim for benefits and the conference order. Rizzo, supra. (Tr. 11-12.) The insurer's attorney again objected to the employee's request to amend the conference order. (Tr. 15.) During this discussion, on the record, the judge properly refused the employee's request. (Tr. 15-16). However, the insurer's attorney agreed to discuss voluntarily extending the employee's benefits beyond May 4, 2022, with his client. (Tr. 17.). The administrative judge instructed the parties to appear before him prior to May 4, 2022, to allow the insurer's attorney to report on the issue and indicated that he would take action at that time.[5] (Tr.

[5] At the hearing, the administrative judge stated:

14.) He also noted that the insurer had elected to depose the impartial physician, Dr. Berenson, and had scheduled a deposition for June 6, 2022, which was approximately a month after the employee's benefits were to terminate, per the conference order. (Tr. 4, 8.)

The hearing proceeded, with two witnesses testifying, but no date was established for the closing of the record.[6] On May 4, 2022, the parties appeared for a virtual status conference and reported that they were unable to reach an agreement on extending the employee's benefits beyond that date. (Dec. 827.) Again, there was no transcript of that proceeding. Rizzo, supra.

In his decision, the administrative judge summarized the reason why, when filing her initial claim, the employee requested benefits only through May 4, 2022, noting

> [T]he employee's attorney, acting on her behalf, filed a claim seeking § 34 benefits from May 4, 2021 to May 4, 2022. He did not file a claim for ongoing § 34 benefits because of a "glitch" in the DIA system. He could not get the computer to accept "to present and continuing" as an end date to his client's claim; a claim that has been routinely filed by claimants throughout the entirety of my 30 years at the DIA and undoubtedly for decades before that. Frustrated that he could not enter a claim "from May 4, 2021 to the present and continuing" Attorney Howard typed in the arbitrary date of "May 4, 2022" exactly one year from his

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> So when we are done here today, we are going to check our calendars and we're going to return at some point prior to May 4th. And at that time, Mr. Powell is going to share with us, the position of his client and we are going to discuss what we are going to do and then I'm going to do it.

(Tr. 14.)

[6] Although the administrative judge did not declare a date upon which the record would close, he did discuss the closing of the record twice at the hearing. First, while discussing whether the insurer would voluntarily agree to extend the employee's benefits until a decision was issued, the administrative judge stated "[a]nd I pledge to write the decision within days of the closing of the record, which can't occur before June 6th," which was the date scheduled for the deposition of the impartial physician. (Tr. 13.) Later, when the employee requested that the judge amend the conference order issued in July 2021 to extend the employee's benefits beyond May 4, 2022, the judge declined to do that, indicating "[a]nd so we are going to handle it another way and there are other ways I can do that, and we have discussed that I just close the record and get the decision out before this whole thing becomes an issue or the parties agree with the section 19 to do it…" (Tr. 16.)

> client's present claim for compensation. Attorney Howard, a sole practitioner, admitted to being a less than savvy operator of modern technologies.

(Dec. 826.)

The judge went on to summarize his perceived dilemma as follows:

> This issue was caused by factors beyond the control of the parties – the DIA glitch that did not allow the employee's counsel to enter the claim she sought to pursue, and COVID 19 delays that brought the case to trial just as her year of benefits was ending. The employee graciously did not object when the insurer asked for a delay in the hearing originally scheduled for March 8. Later this gracious act of postponing the hearing 49 days (to April 26) was revealed to have cost the employee dearly as her § 34 benefit expired just eight days after the rescheduled hearing. Those seven weeks are about the time needed for a deposition to take place and for me to write the decision. The insurer had a choice – pay the employee the several more weeks of § 34 benefits and take the desired deposition, or effectively waive the deposition and avoid paying the employee past the § 34 expiration date. By its informed inaction, it made a choice.
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> The law is well settled that an administrative judge at the Department of Industrial Accidents has equitable powers. I exercise those equitable powers to close the record in this case on May 4, 2022. In doing so I weigh the interests of the parties – the insurer's right to depose the impartial doctor, if done in a timely manner against the employee's right to receive § 34 benefits between conference and hearing, if the entitlement to those benefits has not reached the statutory maximum. Observing that the insurer had the ability to choose the path taken and that the employee did not, and that the employee's right to assert her claim to ongoing benefits was affectively (sic) denied to her by the DIA glitch, I exercise my equitable powers to close the record on May 4, 2022 to minimize the harm to be suffered by the employee. I note the insurer's objection to this ruling.

(Dec. 828.)

Accordingly, over the written objection of the insurer, the administrative judge closed the record on May 4, 2022, following the status conference and issued a decision on May 9, 2022, awarding the employee further weekly benefits beyond May 4, 2022. (Dec. 832.)

The insurer first argues that the administrative judge erred in allowing the employee to amend her initial claim for benefits, absent a written motion.[7] We agree. 452 CMR § 1.22 states, in relevant part:

> (1) Pursuant to M.G.L. c. 152, § 49, a party may amend his or her claim or complaint as to the time, place, cause or nature of the injury, as a matter of right, at any time prior to a conference, with written notice to all parties. At the time of a conference or thereafter, a party may amend such claim or complaint only by filing a motion to amend with the administrative judge. Such a motion shall be allowed by the administrative judge unless the amendment would unduly prejudice the opposing party.

We addressed this issue in DeSisto v. City of Boston, 33 Mass. Workers' Comp. Rep. 231 (2019). In DeSisto, supra, the employee initially filed a claim for benefits involving injuries to his right knee and right wrist, but amended his issue sheet at hearing to include a claim for bilateral "repetitive-use" injuries to his wrists and elbows and submitted it to the judge. Id. at 237-238. The self-insurer did not object to the employee's assertion, nor did it object on the record to the judge's decision to accept the employee's amended issue sheet. Id. at 239. Although we agreed it was error for the judge to allow the amendment absent a written motion pursuant to 452 Code of Mass. Regs. § 1.22 (1), we determined that the error was harmless in light of the self-insurer's failure to raise any objection to litigating the injuries to the additional body parts and the mechanism of injury at the hearing. Id. at 237. In determining the issue was ultimately tried by consent, we noted that during the hearing itself, the employee was questioned extensively about his work activities and their effect on his elbows and knees without objection by the self-insurer. Id at 239.

[7] Adding to the confusion, the employee, on appeal, misconstrues the insurer's appeal. The judge expressly and properly denied the employee's request to amend the conference order at hearing because once the case reached the hearing stage, her request was no longer timely. Without any transcript of what transpired during the proceedings held off the record, we are left with the judge's decision, which seems to support the insurer's argument that the judge allowed the employee to amend her claim at the hearing stage.

Here, unlike in DeSisto, the insurer objected to the employee's request to amend her claim to extend benefits beyond May 4, 2022, both in writing and on the record at the hearing. Rizzo, supra. Although it is unclear from the record when the employee first sought to amend her claim, we know that the issue was raised in the joint pre-trial memorandum, where the employee listed her claim from May 4, 2021, to present and continuing. Id. The employee asserts in her brief, and the insurer does not refute, that the issue was raised at the pre-trial conference. (Employee br. 3.) Both parties agree that the issue was discussed at the initial hearing date on March 8, 2022, after which the insurer filed a written opposition to the employee's motion. (Employee br. 3, Rizzo, supra.) Although "[w]e have repeatedly urged judges and practitioners alike to 'conduct all but the most extraneous of trial business on the record,' " there is no transcript of the initial hearing date or the May 4, 2022, video conference, thus we are unable to determine what was discussed, including whether the judge ruled on the employee's motion at any of these proceedings. Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 235 (2009), quoting Hill v. Dunhill Staffing Systems, Inc., 16 Mass. Workers' Comp. Rep. 460, 462 (2002), quoting Murphy v. City of Boston (School Department), 4 Mass. Workers' Comp. Rep. 169, 173 n.4 (1990). However, based on the decision awarding benefits beyond May 4, 2022, it is clear that the judge ultimately allowed the employee's oral motion over the written objection of the insurer. Further, unlike DeSisto, supra, the issue of the amended claim was not tried by consent since the insurer renewed its objection to the employee's motion to amend the claim at the hearing on April 26, 2022. (Tr. 9.)

In his decision, the administrative judge attributed the employee's failure, in her initial claim, to request benefits beyond May 4, 2022, to a "glitch" in the Department's claims filing system. (Dec. 826.) However, at hearing, the employee's attorney acknowledged that when filing the initial claim, the entire issue could have been avoided had the employee simply requested a longer period of benefits up to the statutory

maximum of 156 weeks.[8] (Tr. 12.) Further, it is unclear why, at any point after the issue was discovered, the employee never filed a written motion to amend the benefits requested, as required by the regulations.[9] Conversely, the insurer repeatedly objected to the employee's attempts to orally amend her claim, by filing a written opposition to the oral amendment prior to the hearing, raising "proper claim" on its hearing issue sheet and objecting on the record at the hearing itself. Rizzo, supra. In light of the insurer's repeated objection, we find it was error for the administrative judge to allow the oral amendment of the employee's claim in contravention of the regulations.

Next, the insurer argues that the administrative judge violated the insurer's due process rights by denying the insurer's request to depose the impartial physician and closing the evidentiary record after the May 4, 2022, status conference over the written objection of the insurer. (Ins. br. 8-9.) We agree. General Laws c. 152, § 11A states, in relevant part that "[e]ither party *shall* have the right to engage the impartial medical examiner to be deposed for the purposes of cross examination." M.G.L. c. 152, § 11A (emphasis added.) Similarly, the Department's corresponding regulation provides that "[a]n administrative judge *shall* authorize the testimony by deposition of the impartial physician." 452 CMR § 1.12(5)(1) (emphasis added.) The mandatory language used in both the statute and the regulation is unequivocal. The administrative judge did not have

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[8] In requesting that the administrative judge amend the July 21, 2021 conference order, the employee's attorney stated,

> And I'm not sure about the technical issues or requirements on your part but because it is here for a hearing, because you understand quite clearly the issue that I was dealing with at that time, and my lack of technological ability or I guess, even imagination, to think that, oh, I should put in the whole three years. When you said that the last time, I was like, yeah, that's what I should have done, because you can't enter P and C anymore, since the pandemic you can't do that.

(Tr. 11-12.)

[9] Counsel was certainly familiar with the process, having filed a written motion to amend the date of injury back in July 2021. Rizzo, supra.

the discretion to deny the insurer this right. Cheetham v. US Manufacturing Company, 19 Mass. Workers' Comp. Rep. 351, 354 (2005).

It is indisputable that due process requirements apply to hearings held at the Department. Haley's Case, 356 Mass. 678, 682 (1970), *citing* Meunier's Case, 319 Mass. 421, 426-427 (1946). These essential due process requirements include the right to examine and cross-examine witnesses. Haley's Case at 681. *See also,* Martin v. Colonial Care Center, 11 Mass. Workers' Comp. Rep. 603, 606 (1997). We have previously recognized parties' incontrovertible statutory right to depose the impartial physician. Cheetham supra. "The right to depose and cross examine the § 11A examiner is an essential due process safeguard." Martin v. Colonial Care Center, 11 Mass. Workers' Comp. Rep. 603 (1997), citing O'Brien's Case, 424 Mass. 16, 23, 24 (1996).

Here, the administrative judge committed reversible error when he denied the insurer's request to depose the impartial physician. It was incorrect to require the insurer to choose between voluntarily extending the employee's § 34 benefits or taking the impartial physician's deposition. The right to depose the impartial physician, grounded in due process, cannot be abrogated by the judge in this manner. In his decision, the administrative judge purported to exercise his equitable powers, over the insurer's objection, to close the record on May 4, 2022, to minimize harm to the employee, reasoning that "the insurer had the ability to choose the path taken and that the employee did not, and that the employee's right to assert her claim to ongoing benefits was affectively [sic] denied to her by the DIA glitch." (Dec. 828.) Even if this were true, it does not empower the judge to ignore the insurer's statutory entitlement to depose the impartial physician. It has long been held that "[t]he board is not bound by strict legal precedent or legal technicalities, but, rather, governed by practice in equity." Utica Mut. Ins. Co. v. Liberty Mut. Ins. Co., 19 Mass. App. Ct. 262, 267 (1985). However, those equity powers cannot be exercised at the expense of the due process rights of a party. Rather, "[t]he term 'in equity' is consonant with the liberal construction to be given to c. 152 and has been 'applied to supply a remedy [even] where there [may be] a gap in the

statute.'" Utica Mut. Ins Co. at 267, quoting from Locke's Workmen's Compensation §§ 29 and 34 (2d ed. 1981).

In this case, no such "gap in the statute" exists that required remedy. Likewise, no "glitch" existed in the DIA system that caused the employee's benefits to expire on May 4, 2022. As previously noted, the employee could have simply requested a longer period of benefits when she filed the initial claim. Instead, the employee received exactly what she asked for at the conference itself.[10] Moreover, she never appealed the conference order, or sought leave to file a late appeal. G.L. c. 152, § 10A(3). It is well settled that a party who fails to appeal a conference order is precluded from receiving a better result at hearing. Beaudoin v. Sabino, 32 Mass. Workers' Comp. Rep. 33, 39 (2018), citing McGahee v. Milton Bradley, 25 Mass. Workers' Comp. Rep. 329, 330 (2011); Staff v. Lexington Builders, Inc., 31 Mass. Workers' Comp. Rep. 99 (2017). Nor did the employee file a written motion to amend her claim. Thus, while not a determining factor in our decision, it is clear that the employee *did* have the ability to choose the path taken several times. By requiring the insurer to choose between its due process right to depose the impartial physician and paying benefits to the employee that it wasn't required to pay, the administrative judge acted arbitrarily, capriciously, contrary to law, and, arguably, punitively.

Because the administrative judge erred by allowing an oral amendment to the employee's claim, over the written objection of the insurer and by denying the insurer's due process right to depose the § 11A physician, we vacate the decision and recommit the case for a hearing de novo.[11]

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[10] The conference memorandum (Form 140) submitted at conference, and signed by both the employee's and insurer's counsel, lists the employee's claim as a closed period of benefits for the period May 4, 2021 to May 4, 2022. Rizzo, supra.

[11] Although we typically reinstate the underlying conference order until a decision on recommittal is filed, in this case the conference order expired prior to the issuance of this decision. See, LaFleur v. Dept. of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014). We note that while this appeal was pending, the employee filed an additional claim. Rizzo, supra. On January 3, 2023, the administrative judge issued a conference order awarding additional benefits pursuant to § 34. Because the subsequent claim filed by the employee is not

So ordered.

Karen S. Fabiszewski
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***August 23, 2023***

before us, the conference order issued on January 3, 2023, in connection with that matter, remains in effect and is not affected by our decision in this appeal.