COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 050811-77**

Angelo Blanco	Employee
Gioioso & Sons	Employer
Ace American Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Long)

The case was heard by Administrative Judge McNamara.

APPEARANCES
Joseph M. Burke, Esq., for the employee
Eugene M. Mullen, Jr., Esq., for the insurer
Robert M. Buchholz, Esq., for the employer
Edward M. Moriarty, Esq., for the employer

FABRICANT, J. The employee appeals from the administrative judge's decision allowing a purported "motion for summary judgment" filed by the employer to dismiss the employee's claim for Section 28 benefits. We vacate the administrative judge's "decision" filed June 10, 2022, and return the employee's claim for Section 28 benefits to the judge for hearing pursuant to M.G.L. c. 152, §§ 11 and 11B.

While it is undisputed that the employee suffered a compensable injury in the course of his employment on December 15, 1977, there is disagreement regarding the specific cause of the injury.[1] An OSHA investigation on December 19, 1977, yielded a citation for a "serious" violation, though there were no citations issued for willful behavior. (Dec. 2.) Regardless, as a result of the workplace incident, the employee was

[1] The employee alleges that he was working in an unguarded trench that collapsed, burying him up to his neck. (Motion Tr., June 24, 2019, p. 2; Employee's Memorandum in Support of His Opposition to Employer's Summary Judgment, p. 4; Dec. p. 2.) The insurer alleges the employee's injuries occurred when a layer of frozen topsoil dislodged from the rim of a completed section of trench and "slid into the trench striking [the employee] in the back." (Motion Tr., June 24, 2019, p. 9; Memorandum in Support of Employer's Summary Judgment, p. 2.)

rendered paraplegic, and has received continuing benefits. A subsequent civil suit filed by the employee's spouse and children in December of 1980 against the employer alleging negligence and intentional infliction of emotional distress was settled by the parties prior to trial. (Dec. p. 2, 3.)

The § 28 claim was not part of the underlying claim in controversy that involved a claim for medical benefits only. A § 10A conference was held on October 9, 2018, and an order issued on October 24, 2018, for medical benefits pursuant to §§ 13 and 30. (Dec. p. 2.) We note that both parties appealed from that order. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). The employee subsequently filed a motion to join the § 28 claim for hearing. [2] The employee's motion was heard on June 24, 2019, and allowed on June 26, 2019. (Id. and Judge's Ruling of June 26, 2019.) The employer's objection to that motion argued that the applicable statutes of limitation would bar the joinder of a § 28 claim 42 years after the subject accident. Specifically, the employer asserted that the version of G.L. c. 152, § 41 in effect on December 15, 1977 time-bars the employee's claim. (Employer brief pp. 1 and 9.) However, the employee pointed out that § 41 must be read in concert with the version of G.L. c. 152, § 49 in effect on December 15, 1977, which stated in relevant part:

> "Failure to make a claim within the time affixed by section forty-one shall not bar proceedings under this chapter if it is found that it was occasioned by mistake or other reasonable cause, or if it was found that the insurer was not prejudiced by the delay. In no case shall failure to make a claim bar proceedings if the insurer has executed an agreement in regard to compensation with the employee or made any payment for compensation under this chapter."

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[2] M.G.L. c. 152 § 28 states, in relevant part:

If the employee is injured by reason of the serious and wilful misconduct of an employer . . . the amounts of compensation hereinafter provided shall be doubled. In case the employer is insured, he shall repay to the insurer the extra compensation paid to the employee. If a claim is made under this section, and the employer is insured, the employer may appear and defend against such claim only.

(G.L. c. 152, § 49, as amended by St. 1953, c. 314, § 6; Employee's Memorandum in Support of His Opposition to Employer's Motion for Summary Judgment, p. 15). Notably, the employer's only substantive argument in response is based solely upon disputed factual allegations that the employee "cannot prove under Section 49 that his dilatory actions were 'occasioned by mistake' and did not prejudice the Employer/Insurer…" (Employer br. p. 9.)[3]

The language of the judge's June 26, 2019, ruling allowing the Motion to Join the § 28 claim makes it clear that the judge considered the argument that the passage of time renders this late filing "unreasonable and unduly prejudicial." (G.L. c. 152, § 41, Judge's Ruling of June 26, 2019 p. 1.) Regardless, the judge explicitly, and correctly, stated:

> Whether the [§ 28] claim has merits will need to be *determined through testimony and evidence presented at hearing*. [4]

(Id. p. 2, emphasis added.)

The board file shows that the underlying claim for medical benefits is scheduled for a § 11 hearing in April of 2023. Rizzo, supra. The employer's "motion for summary judgment," seeking dismissal of the § 28 claim, was filed on April 1, 2020. On November 9, 2020, the parties presented oral arguments, supported by written briefs and documentary exhibits, solely on the issues raised by the motion. (Dec. p. 2.) No stipulations of law or fact were presented, and no exhibits or affidavits were formally entered into evidence. The motion was allowed in a written "decision" filed on June 10, 2022. Despite the judge's earlier declaration that the merits of the § 28 claim "need to be determined through testimony and evidence presented at hearing," no hearing pursuant to §§11 and 11B occurred and the claim was, instead, "denied and dismissed."[5] (Dec. p. 7.)

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[3] We note the insurer's contention misstates the law as the relevant provision uses the word "or" not "and." G.L. c. 152, § 49, as amended by St. 1953, c. 314, § 6.

[4] The ruling then proceeds to provide the parties instructions for scheduling a pre-hearing status conference to identify witnesses and their anticipated testimony. (Id. p. 2.)

[5] Throughout the proceedings, the employee consistently identified several witnesses as well as other purportedly relevant evidence in support of his argument that the employer/insurer was not

452 CMR § 1.11(4)[6] states that "Unless otherwise provided by M.G.L.A. c. 152, or 452 CMR 1.00, the admissibility of evidence and the competency of witnesses to testify at a hearing shall be determined under the rules of evidence applied in the Courts of the Commonwealth." However, no such rule incorporates, or states, that the Massachusetts Rules of Civil Procedure (and specifically Summary Judgment Rule 56) apply to our proceedings. Indeed, our proceedings are governed, with specificity, first by G. L. c. 152 § 10A(3), which provides rules pertaining to the procedures for appeal from an administrative judge's order.[7] The resultant hearing from a § 10A(3) appeal is governed by rules prescribed by G. L. c. 152, § 11 (presentation of evidence at hearings) and § 11B (hearing procedures and depositions). Notably, none of the procedural rules and regulations of the statute recognize motions for "summary judgment."

We also note that the rules regarding the appeal of a hearing decision by an administrative judge are contained in G. L. c. 152, § 11C.[8] Indeed, § 11C only allows

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prejudiced by the delay in filing the § 28 claim. Rizzo, supra. While the passage of 42 years might ultimately present as an overwhelming factor in determining prejudice to the employer/insurer, it is, in the end, just one factor to be weighed by the trier of fact along with all other evidence presented. The allowance of the motion for summary judgement deprived the employee of his right to put in evidence in the case and to have that evidence considered.

[6] 452 CMR § 1.11: Hearings (4), states:

In all hearings before an administrative judge the testimony of witnesses shall be taken orally or by deposition. Unless otherwise provided by M.G.L. c. 152, or 452 CMR 1.00, the admissibility of evidence and the competency of witnesses to testify at a hearing shall be determined under the rules of evidence applied in the courts of the Commonwealth. The decision of the administrative judge shall be based solely on the evidence introduced at the hearing.

[7] General Laws, c. 152, § 10A(3) states, in relevant part:

"Any party aggrieved by an order of an administrative judge shall have fourteen days from the filing date of such order within which to file an appeal for a hearing pursuant to section eleven."

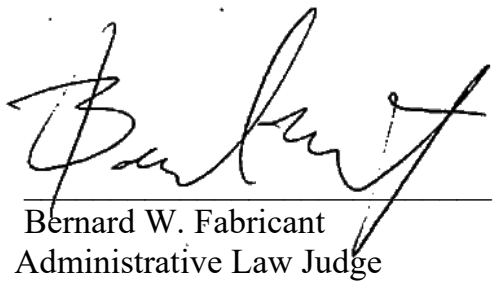
[8] General Laws, c. 152, § 11C states, in relevant part:

"Any party aggrieved by a decision of an administrative judge after a hearing held pursuant to section eleven shall have thirty days from the filing date of such decision within which to file an appeal from said decision to the reviewing board.

appeals from "a decision of an administrative judge after *a hearing held pursuant to section eleven*. . . ." (emphasis supplied.) The statute does not vest the reviewing board with the authority to hear appeals from anything other than hearings conducted in accordance with the act which then result in full and final *decisions* by administrative judges. Moreover, § 11B requires the administrative judge to issue written decisions that "set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision." G.L. c. 152, § 11B. The attempt to issue a "decision" in this matter, where the underlying claim for medical benefits is yet to be heard by the judge, also renders this matter interlocutory in nature and is an example of piecemeal litigation that our statute prohibits. The reviewing board is not vested with the authority to hear appeals from anything other than final decisions. Levesque v. State Road Cement Block Co., Inc., 21 Mass. Workers' Comp. Rep. 39, 40 (2007). Thus, putting aside the fact that the judge was without authority to hear and issue a ruling on a "summary judgment motion," we have noted that even where a judge bifurcates a case for hearing, the judge's ruling on the bifurcated matter cannot be expressed in a "decision" that issues before there is a full and final decision on all the issues in the underlying claim. Richards v. US Bancorp, 28 Mass. Workers' Comp. Rep. 115, 123-124 (2014).

Here, the judge acted beyond her authority by: 1) failing to conduct a hearing on an issue in dispute and attempting instead to dispose of it prior to a § 11 hearing by means of a "summary judgment" ruling; and, 2) issuing what amounts to an interlocutory "decision" in a case that does not dispose of all the issues in dispute. Accordingly, we vacate the judge's ruling, styled as a "decision," and recommit the matter for a hearing with the §§13 and 30 claim pending before the judge pursuant to §§ 11 and 11B.

So ordered.



Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: **March 24, 2023**