COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009526-08**

Brian LaFleur	Employee
Department of Corrections	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Horan and Harpin)

The case was heard by Administrative Judge Maher.

APPEARANCES
Paul S. Danahy, Esq., for the employee
Robin Borgestedt, Esq., for the self-insurer

CALLIOTTE, J. This case has a long and complex history, which includes three hearing decisions before two different administrative judges,[1] and two reviewing board decisions. The employee has prevailed at the hearing level three times, and the self-insurer has appealed each time, resulting, first, in a recommittal for further findings of fact, Lafleur v. M.C.I. Shirley, 24 Mass. Workers' Comp. Rep. 301 (2010)("Lafleur I"), and second, in a reversal and transfer of the case to a different judge for a hearing de novo. Lafleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393 (2011)("Lafleur II"). Following that de novo hearing, the new administrative judge ordered the self-insurer to pay § 34 benefits from April 9, 2008 until April 5, 2011; § 34A benefits from April 6, 2011 to date and continuing; § 36 benefits for loss of function; and a penalty pursuant to § 8(5). The self-insurer has once again appealed. We reverse the § 8(5) penalty award, but otherwise affirm the decision.

The relevant procedural history is as follows. The employee, a corrections officer for over twenty years, claimed he injured his left knee at work on April 9, 2008. In the

[1] The first hearing decision of September 8, 2009, is hereinafter referred to as "Dec. I;" the second hearing decision of March 16, 2011, as "Dec. II;" and the third hearing decision of June 19, 2012, which is the subject of this appeal, as "Dec. III."

first hearing, the self-insurer raised the affirmative defense of § 1(7A).[2] The judge found the employee had suffered three prior left knee injuries: the first, which occurred in 1993 and involved, inter alia, a torn anterior cruciate ligament (ACL), was non-compensable; the second and third, which occurred in 2001[3] and 2003,[4] respectively, were compensable. Based on a medical opinion that the 2008 work injury aggravated a pre-existing tear of the ACL, the judge concluded the employee had satisfied his burden of proving the latest work injury was "a major cause" of his disability and need for treatment, and awarded ongoing § 34 benefits. (Dec. I, 8, 9-10.)

The self-insurer appealed. In Lafleur I, we reversed the judge's decision, in part, holding that the adopted medical evidence of simple causation was inadequate to support § 1(7A)'s "a major cause" standard. Id. at 304. The employee argued, however, that he did not have to prove "a major cause," because the judge had found the 2001 injury involved a compensable tear of his ACL. See Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005)(no need to prove major cause where resultant condition is a product of a combination with prior compensable medical condition). We

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[2] General Laws c. 152, § 1(7A), provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[3] The judge actually found this injury occurred in 1998 in the first two hearing decisions, and we addressed it as such in the first two reviewing board decisions. However, the employee testified in the most recent hearing that the "1998" injury actually occurred in 2001, (Tr. 31-32), and the judge so found. (Dec. III, 7.) Employee's counsel confirmed at oral argument that the 1998 date was erroneous, and that 2001 was the correct date. (OA Tr. 35, 37-38.) He explained the employee originally thought the intervening work-related basketball injury happened in 1998, but when they got the "actual information, board numbers, etcetera, it became apparent that it was actually 2001." (OA Tr. 37.) Therefore, we refer only to the 2001 injury date in this opinion.

[4] There was no testimony at the most recent hearing regarding a 2003 injury mentioned in the first hearing decision and in Lafleur I, supra, at 302.

did not disturb the judge's finding regarding the compensability of the 2001 injury, but held that, contrary to the employee's assertions, his findings regarding the "*nature"* of that injury were equivocal and unclear.[5] Lafleur I, supra, at 305 (emphasis added). We thus vacated the award of § 34 benefits and recommitted the case for the judge to make further findings of fact and, if necessary, to perform the § 1(7A) analysis set forth in Vieira, supra. Lafleur I, supra, at 306.

Following our decision in Lafleur I, the same administrative judge held a status conference and filed a second hearing decision, again awarding § 34 benefits. (Dec. II, 1, 14.) The self-insurer appealed, and we agreed the decision contained numerous errors. In Lafleur II, we held the judge disregarded the recommittal order in Lafleur I by allowing, over the self-insurer's objection, the submission of additional medical evidence to address anew whether the employee's 2008 injury was "a major cause" of his ensuing disability or need for treatment, rather than making findings, as we had directed, regarding the "nature of the [2001] injury and its contribution to the employee's medical condition." Lafleur II, supra, at 398-399. Finding other errors which infringed on the self-insurer's due process rights and called into question the judge's impartiality, we concluded:

> The foregoing errors require us to reverse the decision, vacate the award of benefits, and transfer the case in its entirety to the senior judge for assignment to a different judge for a hearing de novo on the issue of the employee's claim for weekly benefits. See Connors v. Verizon, 23 Mass. Workers' Comp. Rep. 407, [413-414] (2009).

Lafleur II, supra, at 400 (footnote omitted). We noted, however, that the issues of § 50 interest and the self-insurer's defense that the employee's application for and receipt of retirement benefits based on an award of incapacity benefits were "finally determined" in Lafleur I, and would not be part of the issues in dispute in the hearing before the new

[5] Specifically, the judge did not make clear and consistent findings regarding whether the 2001 compensable knee injury involved an ACL tear, and whether it impacted the employee's medical condition after 2008. Lafleur II, supra. at 398-399.

administrative judge. Lafleur II, supra, at 394 n.2. We also held that, although it was not explicitly stated in Lafleur I, "the underlying conference order and its obligations remain effective until the filing of a hearing decision after recommittal." Lafleur II, supra, at 396 n.5. Finally, because the employee had filed for and received § 34A benefits at a § 10A conference by the time of our decision in Lafleur II, we noted the new judge would have jurisdiction of the appeal of that order as well, and that, "[w]hile the matter is pending, the most recent § 10A order remains in effect." Id. at 400 n.12.

On January 10, 2012, a new administrative judge conducted a "hearing de novo," taking "judicial notice of all the prior decisions as well as the entire Board file." (Dec. III, 3.) The case proceeded on the employee's §§ 34, 34A, and 36 claims, as well as his claim for penalties pursuant to §§ 8(1) and (5). The self-insurer raised a number of issues, including the application of § 1(7A). Id.

On November 10, 2011, the employee was examined by Dr. David Morley, the impartial examiner chosen after the appeal of the § 34A conference order. The judge found Dr. Morley's report adequate, but authorized additional medical evidence due to medical complexity. (Dec. III, 4.) Both the employee and the self-insurer submitted additional medical evidence dating from 2008, including some later reports not submitted at the prior hearings. Id. at 2; Exs. 9 and 10.

Taking evidence on all issues, the judge conducted a § 1(7A) analysis *ab initio*. See Vieira, supra. Adopting portions of the opinions of Dr. Morley and Dr. Fraser, he found the employee had suffered a non-work-related left knee injury in 1993, in which he tore his meniscus, which was surgically repaired, and his ACL, which was not repaired. The employee returned to work until 2001, when he re-injured his left knee while playing in a work-sanctioned basketball tournament.[6] Based on Dr. Morley's opinion, the judge found the 2001 injury was a temporary exacerbation of the pre-existing 1993 ACL

[6] The 2001 injury was the same injury which was originally found to have occurred in 1998. See n.3, supra.

injury.[7] The employee subsequently returned to work without restriction. On April 9, 2008, the employee's foot became stuck in the wheel well of a truck he was inspecting as part of his job, resulting in a twisting injury to his left knee. (Dec. 6-7.) Dr. Morley opined, and the judge found, that the employee then suffered an "aggravation and worsening of the left knee ACL" which "was and remains a major cause" of his disability. (Dec. III, 6-7, 10-12, 14-15.)

Based on evidence presented at the 2012 hearing, which included testimony from the employee and two other lay witnesses; the deposition testimony of Dr. Morley; additional medical evidence in the form of reports; and reports from the employee's and insurer's vocational experts, the judge found the employee entitled to § 34 benefits from April 9, 2008, until April 5, 2011, and § 34A benefits thereafter. (Dec. III, 13, 16.) The judge adopted the employee's complaints of pain, including his testimony that he felt pain at all times, "including sitting down and when he gets up and walks around." Id. at 7. He also adopted the employee's testimony that his knee gets stiff after sitting for more than thirty minutes and he has pain at night. (Dec. III, 13; Tr. 47-48.). He found the employee was limited to walking or standing for twenty minutes at a time, with five minute breaks. Although the judge adopted the opinion of Dr. Friedberg that the employee could do sedentary work, and the opinion of Dr. Morley that he could do light and/or sedentary work, the judge also adopted, in part, the opinion of the employee's vocational expert, Carol Falcone, that the employee was precluded from performing those types of work. Id. at 9-11, 13.

The judge also ordered the self-insurer to pay the employee § 36 benefits in the amount of $6,511.69, based on Dr. Friedberg's assessment of a 16% loss of function of his left lower extremity. (Dec. III, 5.) In addition, the judge ordered the self-insurer to pay a penalty pursuant to § 8(5) in the amount of $2,593.12, finding that it illegally terminated benefits between December 4, 2010, and March 26, 2011. Id. at 9.

[7] Dr. Morley's report referred to the first left knee injury as occurring in 1989, and the second in 1998. (Ex. 2.) However, at deposition, he testified that it would not alter his opinions significantly if those injuries actually occurred in 1993 and 2001, respectively. (Dep. 12-13.)

The self-insurer appeals. We first address its argument regarding the scope of the hearing before the new administrative judge. The self-insurer maintains that, because in Lafleur I we determined the employee had failed to satisfy his burden of proving the 2008 work injury was "a major cause" of his ongoing disability under § 1(7A), the new judge was bound by that finding. Acknowledging that a "[h]earing de novo was necessitated by the assignment to a new administrative judge," the self-insurer nonetheless maintains that the only issue before the new judge in the latest hearing was the nature of the 2001[8] compensable injury and its contribution, if any, to the employee's knee condition after his 2008 work injury. (Self-ins. br. 29-31.)

The fundamental problem with the self-insurer's argument is that at no point during the latest hearing did it attempt to limit the § 1(7A) issue to a determination of the nature of the prior compensable injury. It was clear from the judge's statement of the claims and defenses that he intended to try the case anew, including the applicability of § 1(7A). He listed the self-insurer's defenses as, *inter alia*, disability and extent thereof, and causal relationship, including "the application of § 1(7A) for a pre-existing condition." (Tr. 5.) He stated he would "open the record from the beginning of time until the close of the record to go over medical conditions including the insurer's application of the § 1(7A) defense." (Tr. 6.). When the judge asked if he had correctly stated the issues and defenses, both parties agreed that he had, with one exception: the self-insurer argued that the employee's claim for penalties was not properly before the judge. (Tr. 7-12.) Significantly, the self-insurer failed to assert that our prior decisions limited the judge to making findings on the nature of the 2001 injury, and whether it combined with the 2008 injury to defeat the applicability of § 1(7A).[9] Moreover, the

[8] See footnotes 3 and 6, supra.

[9] In fact, when asked to give an offer of proof on that affirmative defense, self-insurer's counsel stated merely that "[t]he employee had a non-work-related injury prior to his work-related injury. He underwent surgery to his knee, which left an ACL tear in place without repairing it." (Tr. 6.). This response addressed only the self-insurer's initial burden of production, see MacDonald's

self-insurer failed to object to Dr. Morley's testimony that the 2008 injury was a major cause of the employee's disability, (Dep. 20), or to the admission of Dr. Fraser's reports, which offered the same opinion.[10] (Ex. 10, Employee additional medical evidence.)

" 'Objections, issues or claims--however meritorious--that have not been raised' below are waived on appeal." Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), quoting Wynn & Wynn, P.C. v. Massachusetts Commn. Against Discrimination, 431 Mass. 655, 674 (2000). By failing to object to the judge's statement of the issues, or to testimony that the 2008 injury "has been and continues to be a major contributing cause of the employee's current left knee condition and disability," (Dep. 21), the self-insurer has waived its right to argue on appeal that the issue of § 1(7A)'s application, in its entirety, was not before the judge. Stated another way, that issue was effectively tried by consent. See McCarty's Case, 75 Mass.App.Ct. 1107 (2009)(Memorandum and Order Pursuant to Rule 1:28)(failure to object to statement of issues adding disputed incident as part of psychiatric claim or to testimony about the incident, resulted in trying disputed incident by consent); Freeman v. Univ. of Massachusetts, 18 Mass. Workers' Comp. Rep. 138, 140 (2004)(injury not claimed was tried by consent where insurer failed to object to employee's examination of impartial physician about causal relationship of that incident, and engaged in cross-examination of impartial physician regarding incident). "Counsel may not try a case on one theory of law, and then obtain appellate review on another theory which was not advanced at trial. Appellate review should not be the occasion to convert the 'consequences of unsuccessful trial tactics and strategy into alleged errors by the judge. ' " Commonwealth v. Lazarovich, 410 Mass. 466, 476 (1991)(citations

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Case, 73 Mass. App. Ct. 657, 659-660 (2009), which, paradoxically, the self-insurer now argues had already been settled.

[10] At the close of lay testimony, self-insurer's counsel stated she did not object to Dr. Morley's report, but she did object to the attached questionnaire (in which Dr. Morley had first stated his major cause opinion). The judge did not strike the questionnaire. (Tr. 142-143.) When Dr. Morley testified at deposition that the 2008 work injury was a major cause of the employee's disability, the self-insurer made no objection. (Dep. 20-21.)

omitted); see also Smith v. Partners Healthcare Sys., Inc., 24 Mass. Workers' Comp. Rep. 43, 47-48 (2010).[11]

Accordingly, we find no merit to the self-insurer's contention that the 2012 hearing, which is the subject of this appeal, should have been limited to determining the nature of an intervening injury, or that the judge was bound by the reviewing board's holding in Lafleur I that the employee had failed to meet his burden of proving the 2008 injury was a major cause of his disability or need for treatment. Because the judge's § 1(7A) analysis was clear and complete, and his findings were supported by the medical

[11] This is not to say that, absent a finding of waiver, the administrative judge erred by interpreting our decision in Lafleur II as authorizing him to retry the case anew. Although that decision leaves some room for interpretation, we think the judge reasonably construed it to allow consideration of the entire § 1(7A) issue. In Lafleur II, we held that the prior judge had erred by reconsidering "a major cause," because Lafleur I had recommitted the case to him on a narrower issue. However, we did not limit the new judge to the same narrow recommittal issue. Rather, we transferred the case "in its entirety" to the senior judge for reassignment to a new judge for a "hearing de novo on the issue of the employee's claim for weekly benefits," Lafleur II, supra, at 400, with only two legal issues specifically taken off the table: the issue of § 50 interest, and the issue of whether application for and receipt of retirement benefits would bar an award of incapacity benefits. Id. at 394 n.2. Both were legal issues, not dependent on fact finding by the judge. We cited to Connors, supra, in which we vacated the decision and ordered the matter returned to the senior judge for a hearing de novo *on all issues*. Id. at 413 (emphasis added). See also La's Case, 82 Mass. App. Ct. 1103(2012)(Memorandum and Order Pursuant to Rule 1:28)(where reviewing board remanded without limitation to allow additional medical evidence and a " 'decision anew,' " and did not remand on narrow issue while affirming or reversing on other issues, case was remanded for entirely new decision, and administrative judge could reconsider extent of disability); cf. Medley v. E.F. Hauserman Co., 10 Mass. Workers' Comp. Rep. 108 (1996)(in employee's appeal from third hearing decision following second recommittal from reviewing board, case remanded to different administrative judge for hearing de novo limited to inquiry of and decision on extent of employee's incapacity on and after specific date).

Under these circumstances, and particularly where, as here, the prior judge committed errors implicating a party's due process rights and calling into question his own impartiality, it was reasonable for the new judge to assume he was to start "from scratch." See Ellison v. NPS Energy Servs., Inc., 23 Mass. Workers' Comp. Rep. 263, 265-266 (2009)(where case reassigned to new judge for hearing de novo, and due process rights of party are implicated, case will be litigated "from scratch"); see also id. at 268 (Horan, J., concurring in part and dissenting in part)(new judge must start job from scratch in most instances); see also Joseph v. City of Fall River, 16 Mass. Workers' Comp. Rep. 261 (2002)(where, after two recommittals to same judge, it was apparent that further recommittal to same judge would be an "exercise in futility," case reassigned to different administrative judge for hearing de novo).

opinions of Dr. Morley and Dr. Fraser, which were in evidence for their full probative value, see Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297, 306 (2007), citing Nancy P. v. D'Amato, 401 Mass. 516, 524-525 (1988), we affirm the judge's finding that the April 9, 2008 work injury was a major cause of the employee's disability.[12]

The self-insurer also argues the judge's incapacity findings are erroneous. The gist of its argument is that the judge erred in relying on the expert vocational testimony of Carol Falcone, who assumed the employee had greater physical restrictions than the adopted medical experts gave him or the judge found. (Self-insurer br. 22.) However, once again, the self-insurer has waived this argument by failing to object to the admission of Ms. Falcone's report, or to move to strike it. Green, supra; Echeverria v. Costa Fruit & Produce, 24 Mass. Workers' Comp. Rep. 1, 4 (2010). Accordingly, the judge could make findings based on Ms. Falcone's opinion, which was admitted for its full probative value. Nancy P., supra, at 524-525.

In adopting the expert vocational opinion, the judge wrote:

> I am persuaded by Ms. Falcone's opinion that Mr. LaFleur has significant deficits and impediments that preclude him from applying many attributes acquired from past relevant employment to work situations on a sustained basis. I further adopt her opinions in part that in applying vocational standards and considering the decreased function of his left lower extremity and limitations medically imposed, sedentary or light options and based upon Mr. LaFleur's education, training, work experience[,] existing skill set and residual function[,] he is unable to return to other types of less strenuous related security work and [] other types of entry-level sedentary and light work options.

(Dec. 9.). The fact that Dr. Friedberg and Dr. Morley opined the employee could do sedentary and/or light work does not invalidate the vocational opinion or preclude a finding of total incapacity. The judge properly adopted the physical restrictions imposed

[12] The self-insurer asserts the finding that the 2008 injury was "the singular cause of the employee's incapacity for work," (Dec. 14), is at odds with the medical opinions of "a major cause." (Self-insurer br. 34-35.) Given the judge's otherwise clear and detailed findings pursuant to § 1(7A), we find this statement inconsequential.

by those physicians,[13] but was not bound by their vocational assessments. Scheffler's Case, 419 Mass. 251, 256 (1994). Finding the employee totally incapacitated in the face of medical opinions stating he was not totally disabled, the judge permissibly credited the employee's complaints of pain, Sweet v. Eagleton School, 25 Mass. Workers' Comp. Rep. 25, 28 (2011), and his testimony regarding his limitations. Dalbec's Case, 69 Mass. App. Ct. 306, 313-314 (2007). There was no error in the judge's incapacity analysis.

Next, the self-insurer challenges the judge's award of § 36 loss of function benefits based on Dr. Friedberg's November 11, 2008 report. The self-insurer posits that, because Dr. Friedberg did not opine the April 9, 2008 injury was a major cause of the employee's disability, his opinion the employee has a permanent impairment of 16% of his lower extremity cannot be adopted. We see no merit to this argument. It is irrelevant whether Dr. Friedberg believed the 2008 injury was a major cause of the permanent impairment of the employee's lower extremity. The judge properly found, based on other medical evidence, that such was the case. Thus, any permanent impairment stemming from the 2008 injury is compensable.

Finally, the self-insurer argues the judge erred in awarding a penalty in the amount of $2,593.12, pursuant to § 8(5).[14] The judge found the self-insurer had "illegally terminated," (Dec. 15), benefits on December 4, 2010, without notice to the employee,

[13] Dr. Friedberg limited the employee to no lifting, pushing or pulling greater than ten pounds; no more than two hours of walking and standing per day; no activities requiring cutting or twisting of his knee; and no contact with prisoners. He opined the employee could do sedentary work. Dr. Morley opined the employee was limited to standing or walking for twenty minutes at a time with five minute breaks, and could do a job classified as essentially light and/or sedentary. (Dec. III, 10-11.)

[14] General Laws c. 152, § 8(5), provides, in relevant part:

> Except as specifically provided above, if the insurer terminates, reduces, or fails to make any payments required under this chapter, and *additional compensation is later ordered*, the employee shall be paid by the insurer a penalty payment equal to twenty percent of the additional compensation due on the date of such finding.

(Emphasis added.)

and "did not begin making payments again until March 26, 2011." (Dec. 9.) Those dates coincide approximately with our issuance of Lafleur I, on December 7, 2010, vacating the first hearing decision's award of § 34 benefits and recommitting the case for further findings, and the filing of the second hearing decision on March 16, 2011, ordering payment of § 34 benefits.[15] (Dec. II, 14.)

The self-insurer argues that the award of a § 8(5) penalty was error because the judge relied on language in Lafleur II, which was issued *after* the self-insurer's alleged illegal discontinuance, to justify the penalty. In Lafleur II, we stated, "[o]nce our decision vacated the hearing decision's award of weekly benefits, the underlying conference order remained in effect." Id. at 396. We further observed:

> [T]he self-insurer remains under the obligation to pay pursuant to a § 10A conference order, while its appeal to a hearing under § 11 is pending. See G.L. c. 152, § 12. Once a subsequent § 11 hearing decision awarding weekly benefits is vacated, and the matter is recommitted for further findings of fact on those issues, the hearing decision's award becomes a nullity. As a result, there is no final determination of the employee's entitlement to weekly benefits at the § 11 hearing level, and the underlying conference order and its obligations remain effective until the filing of a hearing decision after recommittal.

Id. at 396 n.5. The self-insurer contends that, absent the guidance offered in Lafleur II, it could not have known the prior conference order was to be reinstated during the pendency of the recommittal ordered by Lafleur I. The self-insurer points out that, even after Lafleur II, the reviewing board has sometimes included language in our decisions specifically ordering the conference order reinstated. As no such language was included

[15] We reject the self-insurer's contention that because the employee's claim for § 8 penalties was "administratively withdrawn" in the conference order dated August 12, 2011, the employee was barred from joining a § 8 claim in the course of the appeal of that order. See 452 Code Mass. Regs. § 1.07(2)(m)(authorizing administrative withdrawal where penalty claims do not specify subsection of statute applicable). Under these circumstances, the administrative withdrawal had no preclusive effect. The self-insurer does not argue it was prejudiced by such joinder, nor does it contradict the employee's statement that the penalty claim had been re-filed prior to hearing but rejected by the department due to the pending litigation, and that the employee's motion to join the claim had been allowed several days prior to hearing. (Employee br. 23; Tr. 10-11.) Thus, the penalty claim was properly before the judge.

in Lafleur I, the argument goes, it was error for the judge to conclude that reinstatement of the original conference order was intended, and thus error to assess a § 8(5) penalty for illegal termination. We agree the self-insurer's obligations with respect to reinstating the conference order were not sufficiently clear to sustain a finding of illegal discontinuance and warrant the assessment of a § 8(5) penalty.

There is no statutory language directing that the conference order be reinstated in the circumstances presented here, and Lafleur II cites no precedent for its holding. Thus, when Lafleur I was issued, there was no explicit requirement that the conference order be reinstated where a hearing decision's award of benefits is vacated and the matter recommitted. In addition, our decisions have sometimes specifically ordered reinstatement of benefits awarded at conference, and have sometimes been silent on the issue, in the situation presented in Lafleur I. This inconsistent practice occurred before the issuance of Lafleur II,[16] and has persisted subsequent to its filing,[17] potentially creating uncertainty regarding the insurer's obligation vis-à-vis reinstating the conference award during the pendency of a recommittal. In particular, our continued inclusion of reinstatement language in some decisions filed after Lafleur II, seems to belie the assumption in that decision that the conference order is always automatically reinstated whenever we vacate a hearing award and recommit a case. In the face of such inconsistency, and, in the absence of any statutory language on the issue, any prior caselaw setting forth the rule, or any language in Lafleur I regarding reinstatement of the conference order, we cannot say the self-insurer's obligations here were clear.

[16] Compare, e.g., Leary v. M.B.T.A., 19 Mass. Workers' Comp. Rep. 66, 68 (2005)(reinstating § 35 conference order pending recommittal), with Hewitt v. Blue Ridge Ins., 22 Mass. Workers' Comp. Rep. 313 (2008)(vacating award of § 34 benefits, and recommitting case for further findings on eligibility for § 35 benefits, without indicating whether conference order awarding § 35 benefits was to be reinstated).

[17] Compare, e.g., Hibbard v. Henley Enters., 28 Mass. Workers' Comp. Rep. ___ (January 13, 2014)(ordering reinstatement of conference order), with Tunis v. Hillcrest Educ. Ctrs., 26 Mass. Workers' Comp. Rep. 299 (2012)(not indicating whether conference order to be reinstated).

Because of this lack of clarity, a § 8(5) penalty is not warranted here. Penalty provisions, such as § 8(5), which are designed to punish insurers rather than provide restitution to employees, must be strictly construed. See Johnson's Case, 69 Mass. App. Ct. 834, 838-839 (2007)(discussing § 8[1]); Dasilva v. Palladino Landscaping, 25 Mass. Workers' Comp. Rep. 259, 262 (2011). Section 8(5), by its terms, applies only if an insurer "terminates, reduces, or fails to make any payments required under this chapter, *and* additional compensation is later ordered." G. L. c. 152, § 8(5) (emphasis added). Neither requirement was met here. Based on our holding, above, we cannot say that the self-insurer failed to make all payments "required under [chapter 152]."[18] Nor can we say that "additional compensation" was later ordered under the second prong of § 8(5). "Additional compensation" as used in § 8(5) is defined as "compensation due pursuant to an order or decision finding that prior compensation was illegally discontinued." 452 Code Mass. Regs. § 1.02. Because there was no clear requirement the self-insurer revert to paying pursuant to the conference order, there was no illegal discontinuance, and thus "additional compensation" was not ordered.

In addition, the legislature's purpose in enacting § 8(5) would not be furthered by authorizing a penalty here. In Dasilva, supra, we held that the legislature's intent in imposing § 8(5)'s statutory requirement that "additional compensation is later ordered," "was to penalize only those insurers who force employees to litigate their claims of illegal suspension or termination of benefits to a conference order or hearing decision." Id. at 264. The self-insurer did not force such litigation here; rather, it reinstated benefits prior to the employee filing a penalty claim, consistent with the order in the recommittal decision. (Dec. II, 14.) Cf. Murphy's Case, 84 Mass. App. Ct. 1110 (2013) (Memorandum and Order Pursuant to Rule 1:28)(penalty under § 8[1] is not automatic where payment is late; court determines whether purpose of penalty to persuade insurer

[18] In fact, § 8(2) authorizes an insurer to discontinue payments pursuant to a decision, *inter alia*, of the reviewing board, which, in the absence of a clear directive to the contrary, is arguably what the self-insurer did.

to make timely payments would be furthered by its award). Accordingly, we reverse the § 8(5) penalty award. See also DiFronzo's Case, 459 Mass. 338 (2011)(reversal of § 14(1) penalty appropriate where insurer had reasonable grounds for defending claim due to unresolved question of law).

Although we generally agree with the principle expressed in Lafleur II, that "the underlying conference order and its obligations remain effective until the filing of a hearing decision after recommittal," id. at 396 n.5, there may be cases in which a more tailored directive is necessary.[19] Thus, we will henceforth specify reinstatement of the conference order, when appropriate. We think including specific language regarding the parties' obligations will have the additional benefit of making enforcement under § 12 more easily accomplished.[20]

As to all other issues raised by the self-insurer, we affirm the decision.[21] Pursuant to § 13A(6), the self-insurer shall pay employee's attorney a fee in the amount of $1,596.24.

So ordered.

[19] See Bolduc's Case, 84 Mass. App. Ct. 583, 588-589 (2013)("The board is not bound by strict legal precedent or legal technicalities, but, rather, governed by the practice in equity . . . . The term 'in equity' is consonant with the liberal construction to be given to c. 152 and has been 'applied to supply a remedy [even] when there [may be] a gap in the statute.' " Utica Mut. Ins. Co. v. Liberty Mut. Ins. Co., 19 Mass. App. Ct. 262, 267 (1985), quoting from Locke, Workmen's Compensation § 29 at 34 (2d ed. 1981).

[20] General Laws. c. 152, § 12, provides that, when presented with a "certified copy of an order or decision of a board member or of the review board" the superior court "shall enforce the order or decision, notwithstanding whether the matters at issue have been appealed and a decision on the merits of the appeal is pending." It would be incongruous and confusing, at best, to ask the Superior Court to enforce a reviewing board decision vacating a § 34 hearing award by requiring payment of those same benefits awarded at conference, absent specific language in the board's decision requiring reinstatement of the § 34 conference order pending the recommittal decision.

[21] Because the employee has not appealed, we do not address his argument that the judge erred by not awarding a penalty pursuant to § 8(1).

Carol Calliotte
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

William C. Harpin
Administrative Law Judge

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