COMMONWEALTH OF MASSACHUSETTS

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

Brian LaFleur	Employee
M.C.I. Shirley	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Levine)

The case was heard by Administrative Judge Benoit.

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

KOZIOL, J. The self-insurer appeals from a decision issued by the administrative judge after the reviewing board recommitted the case for further findings of fact concerning the nature of a 1998 work injury and its impact, if any, on the applicability of § 1(7A) to the subject April 9, 2008, work injury.[1] LaFleur v. M.C.I. Shirley, 24 Mass. Workers' Comp. Rep. 301 (2010). See Stecchi v. Tewksbury State Hosp., 23 Mass. Workers' Comp. Rep. 347, 349 n.5 (2009); Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005)(outlining steps required for proper analysis of combination injuries under § 1(7A) "major" cause standard). We discuss only four of the nine issues raised by the self-insurer on appeal because they are dispositive, requiring reversal of the decision and further recommittal for a hearing de novo before a different judge on the issue of the

[1] 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.

employee's entitlement to weekly incapacity benefits.[2] Specifically, the self-insurer argues: 1) the judge violated its due process rights by issuing an "interim order" requiring it to resume payment of weekly benefits awarded in the § 10A conference order; 2) the judge erred by conducting a status conference off the record, over its objection, and that the judge's conduct and demeanor during that status conference violated the self-insurer's due process rights and demonstrated bias against the self-insurer; 3) the judge erred by exceeding the scope of the recommittal order; and, 4) the judge violated the self-insurer's due process rights by inappropriately prejudging a potential § 34A claim.

In his decision on recommittal,[3] the judge made the following findings pertinent to the events from which the self-insurer's first three claims of error arise.

> Soon [after the reviewing board's recommittal], counsel for the Employee wrote to me to advise that the Self-Insurer was taking the position that the remand [sic] of the Hearing Decision constituted authorization for it to cease payment of any benefits to the Employee, notwithstanding the Conference Order that had been favorable to him. Upon determining that the Self-Insurer did not agree with my conviction that the Conference Order remained in effect on the basis that the remand [sic] caused the case to revert to the *status quo ante,* I issued an Interim Order that affirmed my conviction that the Self-Insurer had no such authorization.[3]
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> [3] Within that Interim Order I specifically opined that no such order was necessary; since in my view the Reviewing Board's remand [sic] caused the case to automatically revert to the *status quo ante*, to wit, the Conference Order's being in effect just as it was immediately prior to the issuance of the Hearing Decision. My primary purposes in issuing the Interim Order were (1) to specifically state for the benefit of the parties in as clear a manner as possible what I believed to be the Self-Insurer's continuing obligation to be making weekly payments to the Employee without interruption, and (2) to assist a Superior Court Judge, who might have to address these issues but might not have familiarity

[2] As they were finally determined in our prior decision, the issue of § 50 interest and the self-insurer's defense based on the employee's application for and receipt of retirement benefits, will not be part of the issues in dispute in the hearing de novo before the new administrative judge. LaFleur, supra.

[3] Hereinafter, we refer to the recommittal decision as "Dec. II."

> with M.G.L. c. 152 and 452 C.M.R., with a summary of what I considered to be the relevant principles in the case.
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> Thereafter I convened a status conference, in which I related to the parties that I would not receive additional lay testimony but would open the record only for submission of additional medical evidence. The employee submitted a letter from Richard Fraser, M.D. dated February 15, 2011 along with Dr. Fraser's *curriculum vitae*. I admit those documents together as Exhibit Number 10. The Self-Insurer did not submit any additional medical evidence.[4]
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> [4] The Self-insurer submitted a "Self-Insurer's Written Opposition", which was neither discussed at the Status Conference nor authorized by me. Under M.G.L. c. 152's directive that an Administrative Judge - and not an attorney for one of the parties - "shall make such inquiries and investigations as **he** [i.e., the Judge] deems necessary," I decline to accept or consider it.

(Dec. II, 3-4; emphasis and footnotes in original.)

Administrative judges and administrative law judges may act only in accordance with the authority set forth in chapter 152. Perkins's Case, 278 Mass. 294, 299 (1932)("the industrial accident board is a purely administrative tribunal created to administer the workmen's compensation act with the aid of the Superior Court; it possesses only the powers conferred upon it by express grant or necessary implication"). The judge's two-page "Interim Order For Payment of Weekly Benefits" cites to no case, statute, rule or regulation permitting the issuance of such an order, or advisory opinion, after a hearing has been conducted and while a matter is pending after recommittal from the reviewing board. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of documents in board file). Nor do we view these circumstances as conferring any such authority upon the judge by "necessary implication."[4] Once our decision vacated the hearing decision's award of weekly benefits, the underlying conference order remained in effect.[5] Nonetheless, the practical effect of the "interim order" was harmless because

[4] Indeed, the Act expressly provides a remedy for the problem presented here; specifically, an enforcement action in Superior Court. General Laws c. 152, § 12.

[5] We disagree with the employee's claim that the judge's actions are sanctioned by our decision in Carter v. Shaughnessy Kaplan Rehab. Hosp., 9 Mass.Workers' Comp. Rep. 437

it mirrors the award set forth in the original conference order, from which the self-insurer's appeal was still pending before the judge. However, the judge exceeded his authority when he decided to take action for the purpose of "assist[ing] a Superior Court Judge," concerning a potential but not yet filed, enforcement action. (Dec. II, 3, n.3.)

The self-insurer also asserts that its due process rights were violated at the subsequent status conference, when the judge refused to conduct the proceeding on the record, over the self-insurer's objection, and that the judge's demeanor and conduct during that proceeding demonstrated bias against the self-insurer.[6]

(1995). In Carter, the orders in question issued long before a hearing was held. Id. at 440-442. In any event, to the extent the reviewing board may have suggested that there may be occasions when a judge may issue multiple conference orders over a period of time following an appeal from an order issued after a § 10A conference, we now disagree. By the same token, the self-insurer is incorrect in arguing that our decision, which merely vacated the hearing decision's award of weekly benefits and recommitted the matter for further findings of fact, somehow operates to vacate the original § 10A conference order. It was the self-insurer's appeal from the conference order which necessitated the § 11 hearing in the first place. Following the self-insurer's argument to its logical conclusion, once the hearing award was vacated, there would be no need to recommit the matter for further findings, because the conference order no longer had any effect. To the extent that the self-insurer claims the reviewing board intended that result because it did not expressly state that the conference order was reinstated, it is mistaken: the 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.

[6] The self-insurer asserts that the judge prohibited it from presenting its legal arguments about the vocational issues, in contravention of the reviewing board decision; directed the employee to provide a medical report from Dr. Fraser that contained a history of the alleged injury that was more consistent with the employee's testimony; refused to address its concerns about the acceptance of new medical evidence; and, directed the employee to file a claim for § 8 penalties against it. (Self-ins. br. 5, 21-25.) The employee asserts neither side presented any legal arguments at the status conference; the employee was asked whether he was moving to join any claims for further benefits including section 34A or penalties at that time, but he was not encouraged to join or file any claims and declined to do so; both parties were given the same opportunities and time lines; and, that the judge convened the status

Whether all the events at that status conference occurred in the manner described by the self-insurer is largely irrelevant, especially where the remaining record bears out its assertions that contrary to our prior decision's directive, the judge did not allow the self-insurer to voice its concerns about the vocational aspects of the case, and did not address the issue we identified as requiring his attention.[7]

First, however, we address the self-insurer's claim that its due process rights were violated by the judge's method of conducting the status conference. We have repeatedly stressed that all significant proceedings be transcribed for the purpose of assuring the record is adequate for addressing the issues raised on appeal. Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 235 (2009); Hill v. Dunhill Staffing Sys., Inc., 16 Mass. Workers' Comp. Rep. 460, 462 (2002), quoting Murphy v. City of Boston, 4 Mass. Workers' Comp. Rep. 169, 173 n.8 (1990); see also Davis v. P.A. Frisco, Inc., 18 Mass. Workers' Comp. Rep. 285, 287 n.4 (2004).

Where procedures affecting the parties' substantive and procedural rights are conducted off the record, and over the objection of a party, they inherently lack transparency, preventing meaningful appellate review of the parties' claims and compromising the judge's appearance of impartiality. This is particularly true in the present situation where the judge later refused to "accept or consider" the self-insurer's written opposition filed after that proceeding. (Dec. II, 4 n.4.) "The fundamental requisite of due process is an opportunity to be heard at a meaningful

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conference for the purpose of advising the parties that he needed clarification from the evaluating physicians regarding the mechanism of injury and to set a time frame for submission of that information. (Employee br. 22.)

[7] While the self-insurer's brief recounts the alleged details of each claimed deprivation of due process that it asserts occurred at the status conference, a request to supplement the appellate record with an affidavit of counsel would have been the preferred manner of addressing the material parts of the unrecorded proceeding. Nonetheless, the employee does not object to the manner in which the self-insurer makes its argument. Moreover, we consider the self-insurer's subsequent submission of a written opposition to the judge's actions sufficient to preserve the claim for appellate review. (Dec. II, 4 n.4.)

time and in a meaningful manner." Patel v. Hooter Baldwan Misurment, 7 Mass. Workers' Comp. Rep. 167, 168 (1993); see, In The Matter of Kenney, 399 Mass. 431, 435 (1987), citing Goldberg v. Kelly, 397 U.S. 254, 267 (1970) and cases cited. We cannot say the self-insurer was given that opportunity on recommittal.

The self-insurer also correctly asserts that the judge erred by disregarding the order of recommittal. In our first decision, we agreed with the self-insurer that the adopted medical evidence did not support the judge's conclusion that the 2008 work injury, which aggravated a 1993, non-work-related partial tear of the ACL of the employee's left knee, remained a major cause of the employee's disability.[8] LaFleur, supra. See Stewart's Case, 74 Mass. App. Ct. 919, 920 (2010) (required proof, under § 1(7A), addresses "the relative significance of the [work]-incident-related causes of the employee's disability as compared with her significant pre-existing condition"). However, the judge also found that the employee suffered a prior *work-related* aggravation of his compromised knee in 1998: "The 1998 incident also involved a partial tear of the ACL, but again the doctor(s) did not feel that surgery was warranted."[9] LaFleur, supra. The judge then equivocated: "[T]he employee's injury in 2008 was a significant aggravation of *one or more earlier partial tears. . . .* " Id. The implication of finding such a work-related, pre-existing tear is that the employee might avoid the burden of proving "major" causation under § 1(7A), by defeating the first § 1(7A) element: a pre-existing *non-compensable* medical condition. See Vieira, supra. Nonetheless, in the first decision, the judge did not make clear findings susceptible to appropriate appellate review regarding that portion of the analysis. Consequently, it was strictly the question of the nature of the 1998 work injury, and

[8] The judge adopted the opinion of the insurer's § 45 physician, Dr. Ryan Friedberg, that the 2008 work injury was an aggravation of a pre-existing condition. The causation opinion of a treating physician, Dr. Robert Fraser, rested on an account of a contusion of the knee, rather than the twisting injury, as the employee testified at hearing. The judge therefore did not adopt it. See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 596 (2000).

[9] The adopted causation opinion of Dr. Friedberg did not provide the factual predicate of the 1998 partial ACL tear. LaFleur, supra n.4.

its contribution to the employee's medical condition, which we directed the judge to answer on recommittal.[10] LaFleur, supra. See Vieira, supra at 53 ("It is the employee's burden to prove the compensable nature of the pre-existing condition in order to invalidate a § 1(7A) defense").

In addition, in light of our decision to recommit the case, we also expressed no opinion regarding the sufficiency of the judge's vocational analysis and directed the self-insurer to pursue that matter with the administrative judge on recommittal. The parties also agreed that interest was not payable in the case, and we vacated that order.[11] LaFleur, supra.

Instead of addressing the § 1(7A) pre-existing condition issue, the judge on recommittal revisited his erroneous finding of "major" causation, allowing the parties two weeks to submit the evidence he requested. (Dec. II, 3-4.) We consider the self-insurer's objection to the reopening of the medical evidence sufficient to preserve the issue of the erroneous reopening of the settled aspect of the medical case, i.e., that the employee had simply failed to carry his burden of proving "major" causation. Indeed, nowhere in the reviewing board decision recommitting the case was there an expression that the employee should be allowed to revisit his medical offerings on "major" causation. Insofar as the reviewing board addressed that issue, as argued by the self-insurer on appeal, we concluded that there was a failure of proof on that issue, and affirmed the decision in that respect. The recommittal decision, which now relied on the newly solicited evidence on the "major" causation issue, is arbitrary and capricious in its disregard for the order of recommittal. See Caissie v. Wellesley Dept. of Pub. Works, 12 Mass. Workers' Comp. Rep. 1, 4 (1998).

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[10] Indeed, absent the 1998 injury issue, our decision would have ended with a reversal of the unsupported "major cause" finding. See, e.g., Healey v. Tewksbury Hosp., 21 Mass. Workers' Comp. Rep. 87, 89 (2007)(where medical evidence does not support "major" cause finding, reversal, not recommittal, is mandated).

[11] The judge failed to correct the erroneous § 50 interest award against the Commonwealth, ordering interest again in the recommittal decision.

Finally, the self-insurer asserts that it was denied due process when the judge made findings on recommittal pertaining to a potential § 34A claim that was not before him. We agree. Noting there was no claim for § 34A permanent and total incapacity benefits before him, the judge nevertheless found:

> It would, arguably, violate due process for me to make a decision dealing with any such [§ 34A] claim. On the other hand, I do not find that the employee's degree of incapacity has improved, and the maximum period of benefits under M.G.L. c. 152, § 34, will expire very soon. Under the current state of the claims before me, the most that this decision can award is the full extent of § 34 benefits and the maximum amount of § 35 benefits. That is what I intend with this order; in other words, I specifically do not find that the employee has any earning capacity at all. Therefore, the employee will not have to prove a worsening of his condition as part of any claim for § 34A benefits.

(Dec. II, 13; emphasis in original.)

As the judge's discussion acknowledges, the employee's § 34 benefits had not expired as of the date he issued his recommittal decision. (Id.) In light of that fact alone, the judge's further statements implicate a prejudging of matters not properly before him. Cf. Bracchi v. Insurance Auto Auctions, 22 Mass. Workers' Comp. Rep. 287, 288 (2008)(where § 34 benefits exhausted six months before hearing decision issued, judge did not err in ordering maximum § 35 benefits upon exhaustion as the lesser included benefit was awarded for time period in dispute). Moreover, for the judge to note that, "the most that this decision can award," infers he had already made up his mind on the greater benefit entitlement under § 34A at that future date. It was not appropriate for the judge to discuss, much less issue, a prospective order in a case where no additional claim was pending. At the very least, the appearance of impartiality has been compromised, requiring recommittal to another adjudicator.

The foregoing errors require us to reverse the decision, vacate the award of benefits, and transfer the case in its entirety[12] to the senior judge for assignment to a

[12] The board file indicates that further claims have been filed. In August of 2011, the judge issued a conference order awarding § 34A, and other benefits, to the employee. Both parties have appealed from that order and the matter is awaiting a hearing. We do not comment on the merits of those new claims but since the underlying case is being transferred to a new

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, 419 (2009).

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: ***November 30, 2011***

judge, that judge will also have jurisdiction over the appeals from the most recent conference proceeding. While the matter is pending, the most recent § 10A order remains in effect.