

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 063881-91

Deborah Mestieri-Pesta
Taunton State Hospital
Commonwealth of Massachusetts

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Maze-Rothstein & Wilson)

APPEARANCES
Deborah G. Kohl, Esq., for the employee
Michael E. McMahon, Esq., for the self-insurer

CARROLL, J. The employee appeals from the decision of an administrative judge who, citing lack of jurisdiction, denied and dismissed her claim of entitlement to § 69 relief.¹ Because the judge erroneously based his decision on lack of jurisdiction, the decision cannot stand. Accordingly, we recommit the case.

We summarize the facts as presented by the parties. Deborah Mestieri-Pesta is a registered nurse. On November 27, 1991 she sustained a head injury after being struck by an agitated patient in the course of her employment. The self-insurer paid § 34 temporary total incapacity benefits. When the employee had collected the maximum allowable benefits under that section, she filed a claim for further benefits pursuant to § 34A.² The self-insurer resisted the claim necessitating a § 10A conference. (Employee brief 1; Self-insurer brief 1.)

¹ Section 69 provides, in pertinent part, “an employee who is entitled to any sick leave allowance may take such sick leave allowance payment as, when added to the amount of any disability compensation herein provided, will result in the payment to him of his full salary or wages.” G.L. c. 152, § 69.

² The employee alternately claimed § 35 temporary partial incapacity benefits. (Employee brief, 1; Self-insurer brief, 1.)

In December 1996, while awaiting scheduling of the conference, the self-insurer agreed to pay the employee § 35 benefits on a without prejudice basis at a rate of \$299.27 per week.³ On February 20, 1997, the parties agreed to resolve the case by lump sum settlement. (Self-insurer brief 1.)

The employee also requested payment of sick time pursuant to § 69 which the self-insurer resisted. Thereafter, a § 10A conference was held, following which the self-insurer was ordered to allow the employee to use her sick time and pay benefits under § 69. The self-insurer appealed the conference order giving rise to a full evidentiary hearing. The self-insurer did not pay the employee any sick time benefits. (Employee brief 1; Self-insurer brief 1.)

On the day of the scheduled hearing, the self-insurer presented a Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter. The parties orally argued the motion and submitted written memoranda. No testimony was taken from any witnesses and no stenographic record was made. The administrative judge⁴ thereafter issued a “Hearing Decision” granting the self-insurer’s motion and denying and dismissing the employee’s § 69 claim for lack of jurisdiction.

In her appeal, the employee argues that the administrative judge exceeded his authority and denied her due process by issuing a hearing decision without holding an evidentiary hearing, and that his denial of her claim is contrary to law. (Employee brief 2-3.) We confine our review to § 70 which is dispositive of the appeal.

Section 70 of the Act gives the administrative judge jurisdictional authority. It provides, in pertinent part, that “Procedure under sections sixty-nine to seventy-five, inclusive, and the jurisdiction of the department shall be the same as under sections one

³ The employee’s average weekly wage was \$598.91. The amount of § 35 benefit included an agreed upon earning capacity of \$150.00. (Self-insurer brief 1.)

⁴ The administrative judge who issued the conference order no longer served in the department when the matter came on for hearing. Therefore, a different administrative judge was assigned to the case. (Self-insurer brief 2.)

to sixty-eight, inclusive, . . .” The judge’s finding of lack of jurisdiction is wrong as a matter of law.

We hereby recommit the case to the administrative judge to convene and conduct a full evidentiary hearing on the merits of the employee’s § 69 claim.

So ordered.

Martine Carroll
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: