COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 015991-17**

Edna M. Hinanay	Employee
DMHNS 1 North Shore Area – Danvers	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Long)

This case was heard by Administrative Judge Preston

APPEARANCES
Lauren M. Van Iderstine, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

CALLIOTTE, J. The self-insurer appeals from a decision ordering it to pay the employee § 34 temporary total incapacity benefits from February 10, 2018, to date and continuing, as well as §§ 13 and 30 medical benefits, to include right hip treatment, and surgical replacement and rehabilitation, as directed by the employee's physicians. The self-insurer raises five issues. We vacate the decision and recommit the case for further findings of fact and additional medical evidence, as necessary.

The employee, age 53 at hearing, worked at Tewksbury State Hospital as a psychiatric nurse for over twenty-one years prior to her injury on July 3, 2017. On that date, a patient knocked her backwards, causing her to strike a bed rail and then the floor. (Dec. 4.) The self-insurer paid § 34 benefits on a without-prejudice basis until February 9, 2018. Thereafter, the employee filed a claim for § 34 or, alternatively, § 35 temporary partial weekly incapacity benefits, from the date of injury and continuing, alleging back and hip injuries, and claiming §§ 13 and 30 benefits for hip surgery. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3(2002)(permissible to take judicial notice of board file). Following a § 10A conference on August 6, 2018, the judge ordered the self-insurer to pay § 34 benefits from the date claimed and continuing, as well as §§ 13 and 30

benefits, including right hip treatment and surgery. Id. The self-insurer appealed to hearing.

In January 2019, the employee underwent a right total hip replacement. (Dec. 4; Ex. 1, § 11A examination.) A month later, on February 26, 2019, Dr. Frank A. Graf examined the employee pursuant to § 11A. On July 19, 2019, the self-insurer filed a "Motion to Declare the Impartial Report Inadequate," based on Dr. Graf's failure to "state whether the employee's injury is 'a major cause' of her ongoing disability and need for hip surgery." (Ex. A, Non-Evidentiary.) The judge denied the self-insurer's motion on July 22, 2019. Id.

At the hearing on October 7, 2019, the self-insurer raised disability and extent thereof and causal relationship, including § 1(7A)'s pre-existing condition provision. (Dec. 3.) The self-insurer also challenged liability for the hip injury and surgery, but not for the back. (Dec. 3, 4; Exh. 3; Tr. 4-5.) Self-insurer's counsel brought up the motion for inadequacy at the beginning of the hearing, stating he was not sure it had been formally denied. The judge confirmed that he had denied it and asked if the self-insurer wanted to present it again. Counsel for the self-insurer declined, saying he would submit a different motion later. (Tr. 8-9.) Near the end of the hearing, self-insurer's counsel again moved to open the medical record, "based on the fact that the employee had hip surgery on January 14, [2019] and then the impartial, Dr. Graf, saw her approximately a month later." (Tr. 92.) The judge stated that he had found Dr. Graf's report to be adequate, but he would find the medical issues complex, "and you can supply me with any medical evidence that you have." Id. Both parties submitted extensive additional medical evidence covering periods before and after the § 11A report, which was admitted without objection. (See Ex. 6, Employee Additional Medical Evidence; and Ex. 7, [Self-] Insurer Additional Medical Evidence.)

In his decision, the judge found the employee suffered "upper body injuries" when she was knocked down by a patient on July 3, 2017, and also "sustained low back injuries in an earlier industrial accident on March 21, 2014, when she attempted to catch a falling

patient." (Dec. 4.) He again declared the impartial report "adequate," but, contrary to his ruling at hearing, authorized additional medical evidence for the "gap period," stating, "No other additional medical evidence was authorized." (Dec. 3.)

The only medical opinion the judge adopted was that of the § 11A examiner, Dr. Graf. Dr. Graf stated that the employee was injured when a patient fell on top of her and she struck the floor, causing "immediate low back, buttock and right groin pain, and that within a few weeks, [she] experienced radiating pain on the left extending into the lateral and posterior thigh to the knee and sometimes further down." (Dec. 5.) He noted that she had had a right total hip replacement in January 2019, and opined that she has continuing pain, with only partial relief from over-the-counter medications. She has limitations in lifting, standing, sitting, walking and stooping. Moving, walking or standing more than 30 minutes increase her low back and upper leg symptoms. Dr. Graf opined that she has not reached a medical end result and is totally disabled. With respect to causation, the judge expressed Dr. Graf's opinion thus:

- That there is a causal connection between patient's present diagnosis and findings on examination and work injuries of 2014 and 2017.

- That the biomechanics of both events are causal to her present low back and lower extremity pain on the left as well as causal to the exacerbation of symptomatic right hip osteoarthritis with labral tear combining with the osteoarthritic right hip.

(Dec. 5.)

The judge also adopted the opinion of the employee's vocational expert, Rhonda Jellenik, that the employee was "vocationally totally disabled" due to her "work place accidents." (Dec. 6.) She is precluded from both light and sedentary work by her difficulty standing, walking, lifting, bending, stooping and sitting, as well as by her difficulty sleeping, medications, fatigue and difficulty concentrating. Id. Accordingly, the judge found the employee totally incapacitated beginning on February 10, 2018, and ordered the self-insurer to pay for medical treatment and recent hip replacement surgery. (Dec. 8.)

On appeal, the self-insurer makes five arguments. We begin with its contention that the judge made inconsistent findings regarding the purpose for which he allowed additional medical evidence. At hearing, following the self-insurer's second motion to open the record on the ground the impartial physician saw her just a month after her hip surgery, the judge told the parties he would allow them to submit whatever medical evidence they wanted on grounds of medical complexity, and stated that the § 11A report was adequate. (Tr. 92.) In reliance on this ruling, the parties submitted extensive medical records covering periods both before and after the § 11A examination. However, in his hearing decision, the judge authorized additional medical evidence only for an unspecified "gap period," while again declaring the impartial report adequate. (Dec. 3.) We agree with the self-insurer that these contradictory rulings cannot stand.

The purpose for which additional medical evidence is admitted defines the parameters of its use. Medical evidence submitted on grounds of medical complexity may be used for all purposes and periods. Medical evidence submitted for a "gap period" may be used only to determine issues for that period. Where the gap period is prior to the impartial examination, as is usually the case, the gap medicals may be relevant to all issues prior to the impartial medical examination, Martinson v. Atlantic Hospitality Group, LLC, 30 Mass. Workers' Comp. Rep. 65, 68 (2016), or only regarding the issue of disability for that period. Villiard v. Rogers Insulation Specialist, 27 Mass. Workers' Comp. Rep. 1, 5 (2013)(where judge specifically allows additional medical evidence for extent of disability due to inadequacy during pre-§ 11A examination period, such evidence may not then be used for other medical issues such as present disability). Similarly, where the gap period is after the impartial examination, it may be because there is an inadequacy, or a gap, in the § 11A report on the issues of causation and/or disability for the time period after the examination. See Spencer v. JG MacLellan Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 149-150 (2016)(gap medicals not limited to period prior to § 11A exam; where there has been significant change in employee's condition after the impartial exam, judge's decision to allow gap medicals for

the post-exam period upheld). In either event, the judge must tell the parties what the gap period is. In addition, the judge should tell them for what issues he or she is allowing the additional medical evidence, and give them an opportunity to respond to his ruling. Dolan v. Town of Brookline, 34 Mass. Workers' Comp. Rep. ___(July 29, 2020), citing Villiard, supra.

The judge here did not give the parties any such notice. When the parties submitted their medical evidence, they were under the impression the judge would consider such evidence in making his determinations on causation, disability and incapacity for all periods claimed. Indeed, their additional medical submissions covered the entire period in dispute. However, the changed ruling in the decision indicated the only evidence authorized, and, by implication, considered, was for disability for some undetermined gap period. Clearly, these two rulings on the purpose of the additional medical evidence are inconsistent, thus rendering the decision arbitrary and capricious. Cote v. Federal Express Corp., 32 Mass. Workers' Comp. Rep. 117, ___ (2018); Sourdiffe v. U. of Mass/Amherst, 22 Mass. Workers' Comp. Rep. 319, 324-325 (2008). Adding further confusion is the fact that the judge expressly declared the impartial report adequate three separate times: in his denial of the self-insurer's motion for inadequacy, (Ex. A, Non-Evidentiary); at hearing (Tr. 92); and in his decision. (Dec. 3.) If he intended to use the parties' additional medical evidence only for a "gap period," as he stated in his decision, the impartial report, by definition, would be inadequate for that period, contrary to those rulings. See Spencer, supra ("[t]he whole idea of admitting 'gap medical evidence' is to address an inadequacy in an impartial medical examiner's report for a given timeframe").

More importantly, by changing his ruling without notifying the parties, the judge denied them their due process rights by foreclosing " ' "the opportunity to present testimony necessary to present fairly the medical issues." ' " Dolan, supra, quoting Brzezinski v. Aerotek Energy, 24 Mass. Workers' Comp. Rep. 273, 278 (2010), quoting O'Brien's Case, 424 Mass. 16, 23 (1996). Had the parties been aware of the judge's

ruling restricting the use of the additional medical evidence to a gap period, and had they been apprised of what that gap period was, they might have chosen to depose the § 11A examiner, or they might even have submitted different additional medical evidence. See Babbitt v. Youville Hosp., 23 Mass. Workers' Comp. Rep. 215, 218-219 (2009)(where, in decision, judge effectively reversed initial ruling of inadequacy without notice to the parties, he failed to consider that the initial inadequacy ruling may have induced employee to forgo statutory right to depose impartial physician, thus creating a due process violation).

For the above reasons, we recommit the case for the judge to clarify his findings as to the purpose for which he is authorizing additional medical evidence, giving the parties notice and an opportunity to respond to his ruling. The judge is then to consider the evidence authorized appropriately. If, in fact, the judge admitted the medical evidence only for a "gap period," he must define the "gap" for which the § 11A report is inadequate, and tell the parties for which issues the gap evidence will be considered, again allowing the parties to respond to those rulings. Such response may include the submission of different medical evidence, including the deposition of the impartial physician.[1]

[1] Here, we recommit the case for the judge to clarify his ruling rather than to simply consider the evidence on the ground of complexity, as he ruled at hearing, because the self-insurer's motion to which he was responding, insofar as it was based on the fact that the § 11A exam occurred just a month before the employee's hip replacement surgery, could be seen as a motion for additional medical evidence based on inadequacy for a gap period following the examination. See Escalante v. Reidy Heating and Cooling, 17 Mass. Workers' Comp. Rep. 231, 232 (2017)(an important event or development, such as surgery, subsequent to the § 11A examination can render that opinion inadequate as a matter of law). Cf. Murphy v. B&M Office Installation, 24 Mass. Workers' Comp. Rep. 217 (2010)(where the judge declared the impartial report inadequate at hearing and allowed additional medical evidence, but, in his decision, declared the report "fully adequate" and adopted it, we held that the parties were entitled to rely on the judge's ruling of inadequacy at hearing, and recommitted the case for the judge to consider additional medical evidence on that ground). We further note, however, that it was the judge's prerogative to declare the medical issues complex, as he did; he simply could not change that ruling in his decision without providing the parties notice and an opportunity to be heard.

The self-insurer also maintains that the judge erred by failing to make any findings pursuant to § 1(7A),[2] after it was properly raised.[3] We are satisfied that the self-insurer raised § 1(7A) by listing it as an issue on both its conference and hearing memoranda. Rizzo, supra. In fact, the judge acknowledged § 1(7A) was an issue by listing the "[a]pplication of Section 1(7A), pre-existing condition" as an insurer defense, (Dec. 3), and by further describing as an issue in controversy, "Does Section 1(7A) have standing as an affirmative defense." (Dec. 4.) And yet, the judge performed no analysis regarding the applicability of § 1(7A).

The employee counters that the judge was not required to address § 1(7A) because the self-insurer failed to state the grounds for raising that affirmative defense on the record or with an appropriate offer of proof, as required by 452 Code Mass. Regs. § 1.11(1)(d). In effect, the employee argues that the self-insurer waived its affirmative defense of § 1(7A) by failing to follow the regulation. The employee has cited no cases in support of its contention. Based on the prior caselaw and our interpretation of the regulation and its purpose, we disagree that the self-insurer has waived its § 1(7A) defense under the circumstances presented here.

First, we interpret the regulation as setting forth a mechanism by which the self-insurer is to inform the judge and the employee of the non-compensable pre-existing

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[2] General Laws c. 152, § 1(7A), provides, in relevant 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] In a related argument, the self-insurer contends the judge erred by denying its original motion for inadequacy based on the § 11A examiner's alleged failure to address § 1(7A)'s "a major cause" standard. (Ex. A, Non-Evidentiary.) Because our holding above requires that the judge reconsider the purpose for which he is allowing additional medical evidence and clarify the inconsistencies in his rulings on adequacy and the gap period, there is no need to separately address this argument.

conditions(s) which combined with the alleged work-related injury or injuries, as well as the evidence the self-insurer intends to present to support its burden of production under § 1(7A). See MacDonald's Case, 73 Mass App. Ct. 657, 659-660 (2009); Bell v.Electronic Data Systems, 33 Mass. Workers' Comp. Rep. 221, 225 (2019). Like all regulations in 452 Code Mass. Regs. § 1.11, the regulation at issue here is meant to assist the parties and the judge in the fair trial of the case. Section 1.11(d), in particular, is meant to apprise the parties of the basis on which the insurer seeks to raise a § 1(7A) defense by requiring it to show, through its offer of proof, that it has met its burden of production. See MacDonald's Case, supra. However, a failure to meet the burden of production at the outset of the hearing does not necessarily waive the defense, because the regulation is not tied to a specific time period during the hearing. This is particularly pertinent in a case like this where the employee claims to have injured more than one body part.

In Dyan v. S&F Concrete, 25 Mass. Workers' Comp. Rep. 405, 407 (2011), we interpreted the offer of proof regulation consistently with this reasoning. There, the employee alleged that the insurer's statement at the beginning of hearing was insufficient to satisfy an offer of proof. The insurer stated merely, "there may be evidence of a pre-existing non-work-related condition" and the employee "could not satisfy his argument under Section 1(7A)." Id. at 407. We held that there was no waiver of the insurer's § 1(7A) defense for three reasons.

First, the regulation does not require that the insurer make an offer of proof at the start of the hearing. Rather, the insurer may develop its § 1(7A) defense later in the hearing, including through medical depositions. Moreover, the impartial report itself may satisfy the insurer's offer of proof. See Dyan, supra at 409 & n. 3, citing Blanchette's Case, 77 Mass. App. Ct. 1111 (2010)(Memorandum and Order Pursuant to Rule 1:28)(noting, in dicta, that "the proceedings . . . complied with the amended regulation because the evidence of a 'combination was presented on the record at the hearing through the IME [impartial]"); see also Pollard v. M.B.T.A., 35 Mass. Workers' Comp.

Rep. ___ (March 16, 2021); Motherway v. City of Westfield, 23 Mass. Workers' Comp. Rep. 23, 27 and n.6 (2009)(insurer may rely on § 11A report to support a § 1(7A) defense).

Second, in Dyan, supra, the parties clearly demonstrated an awareness of the basis for the insurer's § 1(7A) defense during the hearing through the arguments on the insurer's motion for additional medical evidence and the employee's questioning of the impartial at deposition. And, third, the employee did not allege noncompliance with the regulation at hearing or prior to the decision. Rather, the judge, sua sponte, applied it, without giving the parties any indication at hearing that he believed the insurer had not fulfilled the provisions of the regulation, thereby depriving the insurer of the opportunity to cure the perceived problem. Id. at 410.

Here, when self-insurer's counsel stated on the record that § 1(7A) was an issue, the employee did not object on grounds the self-insurer had failed to make an offer of proof, or on any other grounds, nor did the judge request that the self-insurer make an offer of proof or otherwise inquire as to the basis of its § 1(7A) affirmative defense. Rather, the judge short-circuited any offer of proof by suggesting that § 1(7A) may have been addressed in the medicals and indicating he would look at it later, and then moving on to address the first witness.[4] The judge did not later question the self-insurer on the basis for its § 1(7A) defense. It is the judge's responsibility to "make such inquiries and

[4] The colloquy between the judge and the parties was as follows:

> The Judge: All right, and the issue in dispute is what?
> Ms. Van Iderstine: Disability, extent thereof, causal relationship, and liability, I believe, with respect to the hip injury but not the back injury.
> The Judge: Were those issues addressed by Dr. Graf?
> Ms. Van Iderstine: Yes, your Honor.
> Mr. Jackson: Judge, there's also Section 1(7A), and I don't believe Dr. Graf addressed that issue.
> The Judge: Maybe it was addressed in the medicals. I don't know. I'll look at it later.

(Tr. 4-5.) The judge then immediately began instructing the first witness. (Tr. 5.)

investigations as he deems necessary," and to "require and receive any documentary or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him." G. L. c. 152, § 11. Where the judge abdicates this responsibility, as here, and the employee does not object to the raising of § 1(7A), we are hard-pressed to find the self-insurer has waived that affirmative defense.[5]

This is not to say that we condone the vague approach taken by the parties and the judge here with respect to the presentation of an offer of proof to meet the self-insurer's burden of production. The better practice is for the judge to request an offer of proof, either orally or in writing, stating the precise pre-existing condition which combined with the work injury, and citing the medical evidence which supports such combination. Although the self-insurer may satisfy its offer of proof without specifically making such a statement, as did the insurer in Dyan, supra, the failure by the self-insurer to clearly inform the judge and employee of the basis for the § 1(7A) defense, orally or in writing *at any time during the hearing*, results in unnecessary confusion requiring recommittal, as here. This is particularly true where there is more than one alleged injured body part and more than one alleged pre-existing condition.

Here, the § 11A report, adopted by the judge, supports a finding the self-insurer met its obligation to make an offer of proof meeting its burden of production with respect to the employee's alleged right hip condition, insofar as it states that both the 2017 and 2014 work events caused "exacerbation of symptomatic right hip osteoarthritis with

[5] Our decision in Bell v. Electronic Data Systems, 33 Mass. Workers' Comp. Rep. 221 (2019), where we held the insurer failed to make an appropriate offer of proof to satisfy its burden of production pursuant to § 1(7A), is distinguishable. There, the insurer did not raise § 1(7A) until midway through hearing, and its basis for doing so was the employee's testimony that he weighed 300 pounds, which the insurer stated indicated he had the medical condition of obesity. Id. at 224 and n. 3. However, the judge did not adopt *any* medical opinion that the employee's morbid obesity *combined* with the compensable injury, and the insurer thus failed in his burden of production. Here, the self-insurer clearly raised § 1(7A) prior to and at hearing, and the judge did adopt a medical opinion, at least with respect to the employee's alleged right hip injury, that met its burden of production.

labral tear." (Dec. 5, citing § 11A report.) Thus, it is clear the judge should have begun the § 1(7A) analysis set out in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005), with respect to the alleged right hip injury.

It is not clear, however, that Dr. Graf gave any opinion which supported the self-insurer's burden of production with respect to the accepted low back injury. Neither the employee nor the self-insurer questioned the employee about a prior non-compensable low back condition; rather the self-insurer asked her only whether she had a *work-related* back injury in 2014. (Tr. 38-40.) Yet, in its appellate brief, the self-insurer argues that it met its burden of production regarding the back through *other* medicals submitted at hearing. (Insurer br. 11.) Given the fact that, in his decision, the judge limited the use of the additional medical evidence, by changing his ruling under § 11A(2), it is impossible for us to know whether, 1) the judge even considered the evidence the self-insurer alleges met its burden of production regarding the back injury and §1(7A); or, 2) considered it and just chose not to adopt it. See Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993)(judge must address issues in a manner enabling board "to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found"). Thus, we understand why the self-insurer's argument asserting the judge erred by failing to make § 1(7A) findings is directed almost entirely to the right hip, as the evidence adopted by the judge required only that analysis.

We are cognizant that our ruling requiring the judge to re-examine and reconsider his rulings regarding the submission of additional medical evidence pursuant to § 11A(2) may result in the judge adopting medical evidence other than, or in addition to, Dr. Graf's report, thus creating a completely different medical landscape. For that reason, on recommittal, the judge should require the self-insurer to make an offer of proof regarding its § 1(7A) defense, and then make findings accordingly. If he finds the self-insurer has

satisfied its burden of production with respect to the specific injury or injuries as to which § 1(7A) was raised, he must proceed with the analysis outlined in Vieira, supra.[6]

Finally, the self-insurer maintains the judge demonstrated a lack of impartiality by his conduct at hearing, thus requiring that the decision be vacated and the case be reassigned to a different judge. The self-insurer cites to numerous instances in which it alleges the judge refused to allow the self-insurer to cross-examine the employee. (Tr. 38-72.) See Connors v. Verizon New England, 23 Mass. Workers' Comp. Rep. 407, 414 (2009), quoting from Ott v. Board of Registration in Medicine, 276 Mass. 566, 576 (1931)("[a] decision which is based upon conduct wanting in impartiality, upon a biased attitude of mind and upon refusal to permit essential cross-examination within reasonable limits must ordinarily be held to be clearly wrong"). We agree that the judge was impatient with the self-insurer during his cross-examination of the employee, and repeatedly instructed him to move on to the "next question." However, we do not decide

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[6] We again set out that analysis:

> [T]he administrative judge must first address the nature of the pre-existing condition: whether it stems from an injury or disease, see Vasquez v. Sweetheart Co., 19 Mass. Workers' Comp. Rep. 17, 19 n.4 (2005) and cases cited[,] and if so, whether it is appropriately characterized as "not compensable under [c. 152]." As to the latter inquiry, *"[i]f there is medical evidence that the pre-existing condition continues to retain any connection to an earlier compensable injury or injuries, then that pre-existing condition cannot properly be characterized as 'noncompensable' for the purposes of applying the § 1(7A) requirement that the claimed injury remain 'a major' cause of disability."* Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433, 437 (2001). See also Powers v. Teledyne Rodney Metals, 16 Mass. Workers' Comp. Rep. 229, 231-232 & n.2 (2001). It is the employee's burden to prove the compensable nature of the pre-existing condition in order to invalidate a § 1(7A) defense. See LaGrasso v. Olympic Delivery, 18 Mass. Workers' Comp. Rep. 48, 54-55 (2004). If the pre-existing condition is not compensable, the judge must then address the effect of its combination with the subject work injury. See Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490 (2003). If the employee has not defeated § 1(7A) by successfully attacking either of these first two elements of the statute, the judge must then make findings on the last element: whether the work injury remains a major but not necessarily predominant cause of the resultant disability or need for treatment. See, e.g., Myers v. M.B.T.A., 19 Mass. Workers' Comp. Rep. 22 (2005) and cases cited.

Vieira, supra at 53 (emphasis added).

whether this conduct rises to the level of bias because the self-insurer did not raise a claim of bias at hearing. We have repeatedly held that "any claim of bias must be raised at the time the party asserts it became manifest; otherwise it is waived." Landis v. Commonwealth of Massachusetts, 32 Mass. Workers' Comp. Rep. 229, 231 (2018), citing Smith v. DMHNS 1 North Shore Area Danvers, 31 Mass. Workers' Comp. Rep. 221, 225 (2017)("claim of bias must be raised below, especially when the claimed bias occurs during a hearing, in order for the judge to address the claim and make findings on whether or not he has demonstrated bias towards a party"). The self-insurer's failure to raise the judge's alleged bias against it at the hearing, constitutes a waiver of its right to raise it on appeal. See Landis, supra; 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)("Objections, issues or claims – however meritorious – that have not been raised" below, are waived on appeal).

For the above reasons, the decision is vacated and the case is recommitted to the judge for further findings and proceedings consistent with this opinion. Pending the resolution of the issues following recommittal, the conference order is reinstated. See Lafleur v. Department of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.

Carol Calliotte
Administrative Law Judge

Filed: ***July 30, 2021***

Catherine Watson Koziol
Administrative Law Judge

Martin J. Long
Administrative Law Judge