COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 042778-00**

Jose S. Sanches	Employee
Framingham State Hospital	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Costigan and Fabricant)

APPEARANCES
Joseph F. Agnelli, Jr., Esq., for the employee
Thomas J. Murphy, Esq., for the self-insurer

CARROLL, J. The employee appeals from a decision in which an administrative judge dismissed his liability claim for workers' compensation benefits, due to its unappealed denial at a conference proceeding more than three years earlier. The judge based his decision on Cerasoli v. Hale Development, 13 Mass. Workers' Comp. Rep. 267 (1999). In that case, we concluded that a general denial of an original liability claim in a § 10A conference order was presumed to be on the basis of liability, i.e., that the injury did not arise out of and in the course of the employment. G. L. c. 152, § 26. By failing to appeal the conference order, the employee therefore accepted that his injury was not compensable (see G. L. c. 152, § 10A[3][1]), and was precluded from bringing the same claim again. Cerasoli,

[1] General Laws c. 152, § 10A(3), provides:

> 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. Such hearing shall be held within twenty-eight days of the department's receipt of such appeal.
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> Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings, except that a party who has by mistake, accident or other reasonable cause failed to appeal an order within the time limited herein may within one year of such filing petition the commissioner of the department who may permit such hearing if justice and

supra at 269-270. We affirm the decision on appeal, and take the opportunity to clarify the reasoning of Cerasoli.

The decision we review is appropriately simple and summary. The employee filed a claim for benefits on December 12, 2000, alleging he sustained a work-related heart attack on October 24, 2000. The self-insurer denied the claim. On June 27, 2001, the judge denied the claim in a § 10A conference order. The employee did not appeal the denial.[2] (Dec. 4.)

On September 23, 2002, the employee filed an identical claim for benefits. The self-insurer again denied the claim, and it was again denied at conference. The employee appealed that order to a hearing. The judge concluded, regarding "Liability:" "I do not find that the employee's claim can proceed and that a denial of liability has been established as a result of the prior unappealed order denying liability. I find that the employee's claim is barred by the doctrine of res judicata." (Dec. 5.) The judge therefore dismissed the employee's claim. Id.

Cerasoli, supra, set out the issue:

> The insurer appeals, arguing that the doctrines of res judicata and issue preclusion bar further litigation of Cerasoli's claim. The insurer maintains that the conference order determined all issues raised at conference, including liability. Therefore, the denial at conference should have preclusive effect since res judicata applies to issues like original liability which, once determined, do not change over time. We agree.
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> The order of denial in this case was an unqualified decision that Cerasoli was not entitled to any benefits under the Act. Cerasoli could have

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> equity require it, notwithstanding that a decree has previously been rendered on any order filed, pursuant to section twelve.

[2] The employee relies in some aspects of his argument on a letter, dated July 5, 2001, in which his former attorney forwarded medical records to the judge's attention. The letter is outside of the record on appeal and, in the normal course, we would not consider appellate argument based upon it. However, we take judicial note of the letter, for what it is worth, under Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep, 160, 161 n.3 (2002).

> requested the judge to specify whether he was simply denying payment because of a failure of proof of incapacity, rather than on all grounds including original liability. By not appealing to a hearing *de novo* or requesting that the judge make the blanket denial more specific and limited, Cerasoli accepted the general order of denial. G. L. c. 152, § 10A(3).

Cerasoli, supra at 269. The judge's reliance on Cerasoli was well-founded.

We take the opportunity, however, to clarify Cerasoli, supra, as its reasoning, based on the doctrine of res judicata, is subject to a measure of criticism. Indeed, the dissenting member of the Cerasoli panel pointed out that the reviewing board's prior decisions distinctly exempted conference orders from the application of that common law doctrine.

We stated in Aguiar v. Gordon Aluminum Vinyl, 9 Mass. Workers' Comp. Rep. 103 (1996):

> The conclusive effect of workers' compensation decisions is limited to those issues clearly addressed by the administrative judge. See G. L. c. 152, § 11B (decision must set out each issue in controversy). The rule of res judicata is narrowly applied so as to conclude only those issues essential or explicitly decided.
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> To preclude an issue, one must know what was adjudicated, in order to know what a party is prevented from raising later. Vetrano v. P.A. Milan, 2 Mass. Workers' Comp. Rep. [a]t 234, citing Sargeant's Case, 347 Mass. at 252. Therefore, the manner in which a party is bound must depend upon the explicit directive contained within the document on which the preclusion is based. Further litigation is precluded only where the issue was the basis of the relief, denial of relief or other ultimate right established by the order.

Cerasoli, supra at 271-272 (McCarthy, J., dissenting), quoting Aguiar, supra at 108-109.[3] It cannot be gainsaid that a general order of denial in a conference

[3] The Cerasoli majority's treatment of Aguiar was somewhat too facile for our satisfaction, pointing only to the distinction – the significance of which is indeed the ultimate issue to be decided – that Aguiar involved the non-preclusive effect of a conference order in a case *in which original liability had already been established*. Cerasoli, supra at 270. As a practical matter, however, when an insurer denies an employee's claim in its entirety when filed, and raises liability as an issue at conference,

order is not a decision on the merits for the purposes of the application of res judicata, as there is no way to know the basis for that denial. See Martin v. Ring, 401 Mass. 59, 61 (1987)(" '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgement, and the determination is essential to the judgement, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.' ") Nonetheless, we do not think this point, argued capably by the employee on appeal, is availing for the reasons that follow.

The *unappealed* order of denial in this case, like that in Cerasoli, resembles a dismissal order resulting from a plaintiff's failure to prosecute a civil complaint. The resulting default judgment against that moving party is indeed a judgment that bars further litigation of the complaint, unless he can successfully obtain relief from the judgment under the provisions of Rule 60(b).[4] We see that escape hatch as similar to § 10A(3)'s provision allowing a petition to the commissioner within one year for reinstatement of an aggrieved party's right to a full evidentiary hearing on the matters addressed in the § 10A conference order. The point is that the inaction of a plaintiff, by failing to prosecute a case through discovery or attendance at pre-trial proceedings prior to trial, or of an employee, by failing to appeal a conference order, is an omission that has prejudicial consequences, absent resort to the extraordinary remedies provided. See Lewis v. McAlpine, 2006 Mass. App. Div. 44 (dismissal order on complaint, for failure to participate in pretrial conference default judgment, barred further proceedings on underlying claim, in absence of grounds for Rule 60[b] relief). Cf. Powers v. H.B. Smith Co.,

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the employee should consider a "Denial of Payment" conference order as an adverse finding on liability, requiring an appeal.

[4] Mass. R. Civ. P. 60(b) provides, in relevant part, that, "[o]n motion, and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ." The rule mandates that motions under subsection (b)(1) be made within one year of the judgment sought to be vacated. Id.

Inc., 42 Mass. App. Ct. 657, 660 (1997)(judge properly exercised his discretion in vacating default judgment entered for failure to appear at pretrial conference). Accord Commonwealth v. Clark, 2006 Mass. App. Ct. (05-P-1290) (December 18, 2006)(failure to file entry fee for appeal resulted in dismissal of appeal of civil commitment and wholesale loss of appellate rights). We are not authorized to provide unlimited opportunities to any party. The function of these rules is to "balance the competing claims of fairness to the litigants and case-flow efficiency." Scannell v. Ed. Ferreirinha & Irmao, Lda., 401 Mass. 155, 158 (1987).

Under the circumstances of this case, we do not see that the employee's counsel's letter to the judge forwarding medical records takes the case out of the Cerasoli bar to further claims for the 2000 injury. Besides the fact that the letter is not an exhibit listed in the hearing decision, it did not stand as an affirmative demonstration of excusable mistake or inadvertence under the escape hatch provisions of § 10A(3) discussed above. No other showing of why counsel for the employee did not properly prosecute the employee's claim for a full evidentiary hearing has been put forward. The employee's bald assertions of equitable rights fall short. We consider that the provisions of § 10A(3) suffice as reasonable accommodations for excusable neglect. There must be some finality to proceedings in which parties are not following the prescribed route to preserving and prosecuting claims. Indeed, the claim having been made in this case, the statute of limitations was tolled pursuant to § 41.[5] Were we to accept the employee's argument, he could keep bringing claims for the same injury without ever being time-barred from doing so. Such a result simply is not an appropriate construction of § 10A(3).

[5] General Laws c. 152, § 41, provides, in pertinent part:

> The payment of compensation for any injury pursuant to this chapter or the filing of a claim for compensation as provided in this chapter shall toll the statute of limitations for any benefits due pursuant to this chapter for such injury.

The decision is affirmed.

So ordered.

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **February 8, 2007**

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Bernard W. Fabricant
Administrative Law Judge