COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 052738-93 046205-96**
Judith Fallon	Employee
Department of Revenue	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Levine and Maze-Rothstein)

APPEARANCES
Judson L. Pierce, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

MCCARTHY, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee temporary total incapacity benefits for a 1996 recurrence of an accepted 1993 industrial injury. For the reasons that follow, we reverse the decision, and recommit the case to the administrative judge for further proceedings and decision anew.

On December 13, 1993, Ms. Fallon injured her back while pulling files from a file drawer at work. She was paid weekly temporary total incapacity benefits while out of work for six months. She then returned to work part-time, while receiving partial incapacity benefits. On November 20, 1996, the employee slipped and fell on metal stairs in a garage. She experienced severe back pain, and also injured her hip and ankle. She has not worked since that time. (Dec. 3.)

The self-insurer resisted the employee's claim for benefits as a result of a new injury on November 20, 1996, and payment was denied at the § 10A conference on August 6, 1997. The employee appealed that conference order, but later withdrew the appeal prior to the hearing. The employee then filed a new claim for compensation benefits in the alternative, due either to the 1996 incident, or a recurrence of the incapacity as a result of the 1993 industrial injury. That claim was conferenced on

March 1, 2000, and was likewise denied. The employee appealed to a full evidentiary hearing. (Dec. 2.)

Mark M. Berenson, M.D., an orthopedic surgeon, did an impartial medical examination of Ms. Fallon under § 11A on May 18, 2000. Doctor Berenson's report is the only medical evidence in the case. The impartial physician diagnosed the employee as suffering from "irritation of underlying degenerative disc disease of the lumbar spine with chronic low back pain, all related to the injury in 1993 . . . exacerbated by the injury on November 20, 1996." (Dec. 4, quoting Impartial Medical Report.) The doctor opined that the employee had a permanent partial disability, and could gradually return to restricted work.

The judge determined that the employee's claim for the 1996 injury was barred by res judicata under the rule of Cerasoli v. Hale Dev., 13 Mass. Workers' Comp. Rep. 267 (1999). (Dec. 5.) In that case, the reviewing board held that an unappealed conference order denying payment on an initial liability claim was a rejection of the claim *in toto*, notwithstanding the lack of any articulated basis for the denial in the conference order. The very occurrence of a compensable industrial injury is thus presumed to have been denied, and any future claim for that injury is foreclosed. Id. at 270. The judge here analyzed the employee's claim as a recurrence of the accepted 1993 injury. She awarded the employee temporary total incapacity benefits from November 20, 1996 to exhaustion or the date of the impartial examination, whichever came first, noting that the employee had already exhausted her entitlement to § 35 partial incapacity benefits due to the 1993 injury. (Dec. 6-7.)

The self-insurer on appeal argues that the judge did not apply res judicata to the August 11, 1997 conference order denying payment on the employee's claim for a new injury on November 20, 1996. While we disagree, because the judge explicitly did just that by applying Cerasoli, we do think that her award of benefits for incapacity stemming from that second event erroneously ran afoul of the non-apportionment principle which

governs where there are successive injuries. See, e.g., Evan's Case, 299 Mass. 435, 436-437 (1938). After finding that a new disabling injury occurred on November 20, 1996, (Dec. 5), the judge could not order that benefits related to that event be paid as part of the loss flowing from the earlier 1993 injury.

There is another point of law, which is dispositive and, if left unaddressed, would expand the res judicata effect of conference denials of payment under Cerasoli, supra. In Cerasoli, the insurer raised liability as an issue at the conference proceeding by appropriately specifying that in the conference memorandum.[1] Id. at 268. Cerasoli is inapposite to the present case because the self-insurer here did not raise liability as an issue in its conference memorandum of August 6, 1997.[2] There is no basis for reading Cerasoli to stand for the proposition that a conference order, which denies payment on an initial liability claim for compensation benefits, is a final determination of issues *that are not raised at conference in defense of the claim*. See Heredia v. Simmons Co., 10 Mass. Workers' Comp. Rep. 490, 493 (1996)(unappealed conference order determines, for purposes of issues preclusion, "only those issues actually presented to the judge"). The employee's claim for benefits stemming from the November 20, 1996 slip and fall at work is thus not barred for any period of incapacity commencing on or after August 12, 1997, i.e., the day after the conference order of denial issued. See Hendricks v. Federal Express, 10 Mass. Workers' Comp. Rep. 660, 661 (1996)(employee may claim benefits outside the period covered in the conference order); Cerasoli, supra at 271 (McCarthy, J., dissenting). We therefore reverse the denial of the employee's claim for benefits due to the November 20, 1996 industrial injury and recommit the case for further findings.

[1] Putting "liability" in issue forced the employee to prove that she suffered an industrial injury arising out of and in the course of her employment.

[2] We take judicial notice of the conference memorandum contained within the board file. Oral presentations made at conference are not transcribed, so the only records are the written submissions.

The self-insurer's second argument is that the judge could not rely upon the May 18, 2000 impartial report as support for the award of temporary total incapacity benefits for the disputed period of incapacity *prior* to that medical examination. We agree, as there is nothing in the doctor's report that speaks to that period of incapacity. However, the reversal advocated by the self-insurer is not indicated. Rather this is a case that falls squarely within the rule set out in Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263 (1997), and its progeny. Specifically, in Miller v. M.D.C., 11 Mass. Workers' Comp. Rep 355 (1997), we analyzed an award of benefits partly unsupported by an impartial physician's opinion, because it did not address the period of time prior to the medical examination:

> [T]he judge was not competent to fill the evidentiary gap on his own. However, by ordering the commencement of § 34A benefits nearly five months prior to the impartial examination, he apparently felt that the employee was entitled to those benefits earlier than the examination date. Taking that view, the judge should have exercised his authority *sua sponte* to require additional medical evidence.

Id. at 358. See also Lanzille v. August A. Busch & Co. of MA, 13 Mass. Workers' Comp. Rep. 372, 374 (1999). Cf. Carelus v. Four Seasons Hotel, 16 Mass. Worker's Comp. Rep.___ (2002)(no evidence of change of employee's condition so earlier doctor's opinion can be adopted over the later impartial physician's opinion). The same holds true here. On recommittal, the judge shall allow additional medical evidence to address the period of incapacity prior to the impartial examination, and reassess the extent of incapacity based on the parties' submissions.

We recommit the case for further proceedings and findings consistent with this opinion.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **September 26, 2002**

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Frederick E. Levine
Administrative Law Judge

MAZE-ROTHSTEIN, J., concurring I agree that recommittal is appropriate for this case, and that the judge's application of Cerasoli, supra, was erroneous for the reason articulated by the majority. That being said, I would overrule Cerasoli, not just distinguish it.

The reasoning expressed in Cerasoli is profoundly short on legal support and long on *ipse dixit.* It runs counter to even the most elementary principles of res judicata. It stands for the proposition that the *boilerplate* conference order language, "[b]ased on information available at the time of the conference, I deny the claim for compensation," forecloses any future claim on a given industrial accident *for all time*, when liability has not yet been established. Cf. G. L. c. 152, § 16. That order, emanating from a non-evidentiary presentation by counsel, and stating nothing regarding the basis for the denial, *cannot*, as a matter of law, bar future litigation. "To preclude an issue [i.e. liability], one must know what was adjudicated, in order to know what a party is prevented from raising later." Aguiar v. Gordon Aluminum Vinyl, 9 Mass. Workers' Comp. Rep. 103, 109 (1996). Unless conference orders are tailored to read "no personal injury arising out of and in the course of the employment having been found to have occurred, payment is denied," it is fanciful to read that "finding" into the language of a standard denial order. As the Cerasoli dissent aptly reasoned:

> [T]he inference that "No liability" is the premise for the denial of payment simply does not follow. "[W]here a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion. But such an inference must be inevitable, or it cannot be drawn." Burlen v. Shannon, 99 Mass. 198, 203 (1968). The inference of a "No liability" finding here is anything but "inevitable;" it is pure speculation.

Cerasoli, supra at 271, McCarthy, J., dissenting.

As to the Cerasoli majority's attempt to bolster its position by citation to § 10A(3), "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 . . . ," id. at 269, what, we should all ask, does one "accept" in a denial of payment? We certainly do not know from the four corners of the order that anything was determined except that, as of that day, the

judge, for one or more of a myriad of possible reasons, denied employee's claim for whatever benefits she sought. Certainly, our understanding has been, Cerasoli notwithstanding, that a denial conference order bars future litigation for any benefits sought *prior* to the issuance of that order. The flip side of this proposition is the consistent and time-honored tenet, "[a]n unappealed conference order . . . does not bar a claim for further weekly benefits for any period of disability related to the same date of injury which occurs after the date of the unappealed conference order." Russo's Case, 46 Mass. App. Ct. 923 (1999)(rescript)(internal quotes omitted). Without some specific reference to the denial of liability, acceptance of the denial of payment means what is says - - an acceptance that payment was denied at conference and nothing more! See Slater's Case, 55 Mass. App. Ct. 326, 329 (2002)(court declined to judicially add the word, "maximum" to language contained in § 34A based on generalized legislative expressions of cost-savings in 1991 legislation). Indeed, just as the Appeals Court reversed the reviewing board's strained read of § 34A in Slater supra, we should follow suit and do the same here.

It is noteworthy that the majority decision in the reviewing board's review of the Slater case was at least based on dubious assertions of legislative history. Slater v. Donaldson Construction, 14 Mass. Workers' Comp. Rep. 117 (2000). Cerasoli only appears on the other hand, is based on nothing at all!

In fact, Cerasoli only appears to use "[t]he history of the common law interpretation of the Act [as] further support to [its] conclusion that the unappealed conference order of denial precludes further litigation for this date of injury." Id. at 270. It cites no less than *seven* cases seemingly supporting this claim. Those cases, dating from 1924 to 1967 (such as Mozetski's Case, 299 Mass. 370, 373 (1938)), add nothing to the analysis of what conference orders denying payment mean. This is because *conference orders did not exist when those opinions were written!* The Cerasoli string cite of cases that addresses the impact of hearing decisions and approved agreements actually proves only one thing: *Communis error facit jus.* ("Common error, repeated many times, makes law.")

It is time that we unmake this law and overrule Cerasoli.

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Susan Maze-Rothstein
Administrative Law Judge