COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**044782-92**
Mark Cerasoli	Employee
Hale Development	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Smith, Wilson, and McCarthy)

APPEARANCES
Sandra Jenkins-Bryant, Esq., for the employee at hearing
James N. Ellis, Sr., Esq., for the employee on brief
Gillian Schiller, Esq., for the employee at oral argument
Thomas E. Fleischer, Esq., for the insurer

SMITH, J. The insurer appeals from the decision of an administrative judge holding that the employee was not precluded from pursuing this, his second, original liability claim for the same date of injury. An administrative judge had denied the employee's first original liability claim after a § 10A conference. The employee had not appealed the conference denial. Because the unappealed conference order finally settled the original liability issue, we reverse the judge's decision and deny the second claim.

Cerasoli claimed to have received an injury to his back from lifting a heavy bag of cement at work on September 21, 1992. The insurer paid compensation voluntarily, without prejudice, until September 18, 1993. (Dec. 4, Ex. 2.)

When the voluntary payment ceased, Cerasoli filed a formal claim with the Department of Industrial Accidents. (Ex. 2: Stipulation of Facts, # 5.) The insurer denied the claim on the following bases: "No Personal Injury: Witnesses and documents dispute that claimant received a personal injury." "No injury Arising Out of and in the Course of Employment: Injury was not caused by an incident of the employment." "No disability: Witnesses and documents dispute that the employee has been disabled as alleged.

Witnesses and documents dispute employee's ongoing disability." "No Causal Relation Between Personal Injury and Disability: Condition preexisted injury." (Insurer's Notification of Denial, prepared September 24, 1993; Ex. 2: Stipulation of Facts, # 6.) The case then proceeded through conciliation to conference.

At conference, liability remained in dispute. (Ex. 2: Stipulation of Facts, # 8; Ex. 4: Temporary Conference Memorandum dated November 16, 1993.) The employee sought § 34 total compensation benefits for the period that he had been paid without prejudice, as well as ongoing § 35 partial compensation benefits from September 18, 1993, and § 30 medical benefits. After conference, on November 22, 1993, an administrative judge issued a blanket order denying Cerasoli's claim. The order did not recognize the existence of liability or order payment of any medical treatment. (Ex. 3.) Cerasoli did not appeal the denial; nor did he request permission to file a late appeal. (Ex. 2: Stipulation of Facts # 10-11.) He did not present a certified copy of the order to the superior court, pursuant to G.L. c. 152, § 12, and seek relief from the denial order in the constitutional courts.

Instead, on or about December 27, 1995, over two years after the issuance of the order denying his claim, Cerasoli filed a new original liability claim for the same date of injury. (Ex. 2: Stipulation of Facts # 12.) The new claim came on for conference before a different judge from the one who had issued the earlier denial order.[1] At conference, the insurer raised the defense of res judicata. (Ex. 1: Insurer's Motion to Deny and Dismiss Claim; Ex. 2: Stipulation of Facts # 14.) By conference order dated May 6, 1993, the new administrative judge denied Cerasoli's claim. Cerasoli then appealed for hearing de novo. (Dec. 1-2.)

At hearing, the judge bifurcated the issues, deciding only the question of whether

[1] Apparently, assignment to the same judge who had heard the original action was impractical. See G.L. c. 152, § 10A(1), which provides, in pertinent part: " Except where events beyond the control of the department make such scheduling impracticable, the administrative judge assigned to any case referred to the division of dispute resolution shall retain exclusive jurisdiction over the matter and any subsequent claim or complaint related to the alleged injury shall be referred to the same administrative judge."

the prior unappealed conference order precluded Cerasoli from further litigating his claim. (Dec. 1-2.) The judge held that the unappealed conference order bound the parties only as to matters explicitly determined by that conference order. Because the judge found it impossible to determine from the prior judge's conference order why the claim had been denied (i.e., lack of liability or causation, no impairment of earning capacity, pre-existing condition, or intervening incident), he ruled that the conference order of denial had no preclusive effect beyond the date of its issuance. The judge issued a decision permitting Cerasoli to proceed to litigate the merits of his claim, including original liability. (Dec. 4-5, 6.)

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 that the judge's decision is contrary to law.

The specific language of the workers' compensation act governs the issue, which in this situation is consistent with general principles of res judicata.[2] Section 10A(3) provides, in pertinent part:

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

(Emphasis supplied.)

The conference order of denial, no review having been requested, bound the parties as to all matters covered by it. See In Re Hunnewell, 220 Mass. 352, 353 (1915). Had the judge found that an injury occurred, which necessitated medical treatment but

did not cause incapacity beyond that voluntarily paid, he would have rendered an order denying the weekly compensation claim but generically awarding reasonable and necessary medical treatment. He did not do so. 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 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,[3] Cerasoli accepted the general order of denial. G.L. c. 152, § 10A(3).

In reaching this conclusion, we have attempted to construe the workers' compensation act as a whole, giving to every section, clause and word such force and effect as are reasonably practical. See Neff v. Commissioner of Dept. of Indus. Accidents, 421 Mass. 70, 73 (1995). Section 11B provides that "[p]rocedures within the division of dispute resolution shall be as simple and summary as reasonable." (Emphasis added.) Permitting repetitive litigation simply because a conference order was a blanket denial would violate that principle.

The Workers' Compensation Act contains stages of dispute resolution proceedings, each having expressly detailed procedures with which a litigant must comply. Neff at 74. The sections detailing post-conference proceedings, §§ 10A(3), 11, 11B, 11C and 12, would be rendered superfluous by an interpretation that a losing party could circumvent an adverse conference order by merely re-filing the same claim or complaint. In addition, there is a danger of stale claims being revived after the essential witnesses have disappeared and memories faded. The statute of limitations may not protect against this problem where a claim has been made and denied. See G.L. c. 152, § 41 (claim *filing* tolls the statute of limitations).

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[2] Compare G.L. c. 152, § 16, which abrogates normal principles of res judicata in claims for further compensation where initial liability has been established.

[3] See Aguiar, 9 Mass. Workers' Comp. at 113 (Maze-Rothstein, concurring) (specific designations may be made in response to a party's request).

The history of the common law interpretation of the Act lends further support to our conclusion that the unappealed conference order of denial precludes further litigation for this date of injury. See Casieri's Case, 286 Mass. 50, 54 (1934) (unappealed decision that no incapacity existed); Mozetski's Case, 299 Mass. 370, 373 (1938) (further proceeding does not reopen questions determined in making the original order). The basic question of initial liability under the Act has not been easily opened for further consideration or different determination. See Kareske's Case, 250 Mass. 220, 224, 227 (1924) (res judicata effect of an approved agreement); Perkins' Case, 278 Mass. 294, 299 (1932) (further inquiry into the merits of the original controversy, both as to liability and compensation for the period covered, is at an end in the absence of fraud or mistake). An employee should not be permitted to obtain an initial liability award, which he previously forbore to litigate. See Kareske's Case, 250 Mass. at 227. An order cannot be reviewed once its appeal period has run. See Mozetski's Case, 299 Mass. at 373. Where no appeal from an order is filed, a judge is bound by the denial. See Rocha's Case, 300 Mass. 121, 125 (1938); Longerato's Case, 352 Mass. 284, 287 (1967).

Aguiar v. Gordon Aluminum Vinyl, 9 Mass. Workers' Comp. Rep. 103 (1995), did not abandon the application of res judicata in workers' compensation cases but merely discussed claim preclusion where original liability had been established and further compensation was sought. Indeed, both the majority and concurring opinions acknowledged that res judicata has its full preclusive effect on the issue of original liability. Aguiar, *supra* at 108,[4] 113.[5] Cerasoli has proposed no good reason why he did not exhaust his administrative remedy in the original case and now, years later, should be permitted to relitigate the original liability issue. See Id. at 107. The application of res judicata in this case will prevent a needless duplication of the effort and expense

[4] Citing Longerato's Case, 352 Mass. 284, 287 (1967), we distinguished the situation where liability had been established and the subsequent dispute centered merely on the nature and extent of the compensable injury, from one where relitigation of a denied initial claim was sought.

[5] The concurring judge wrote: "By contrast, res judicata can have its full preclusive effect on issues such as: original liability- the occurrence or nonoccurrrence of an industrial accident . . . ."

expended the first time the case was heard. See Id.

The administrative judge erred as a matter of law in allowing the hearing to proceed. We reverse the judge's decision and deny the pending claim.

So ordered.

Suzanne E.K. Smith
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: August 19, 1999

MCCARTHY, J., (dissenting) There is nothing in the November 22, 1993 conference order that allows us to indulge the presumption that the judge denied payment on the basis of liability. It is just as likely that payment was denied because Mr. Cerasoli failed to produce medical reports to substantiate his claim, or produced inconclusive reports. In addition to denying that the employee sustained a work related injury, the insurer put in issue (and thereby called upon the employee to prove) incapacity and the extent thereof, causal relationship, pre-existing condition, superseding incident and serious and willful misconduct by the employee. The judge may well have denied payment believing that some one or all of these issues should be exposed to a full evidentiary hearing. There is simply no way of knowing.

The fact that the judge did not order medical benefits likewise imputes nothing regarding liability. The record is silent on whether the employee presented medical bills at the conference for the judge's determination under § 30. See 452 C.M.R. § 1.07(2). If medical bills were not produced at the conference, there would have been no reason for the judge to order payment for medical treatment. See Paygai v. Wrentham State School, 10 Mass. Workers' Comp. Rep 685, 686 (1996).

All we do know is that the judge denied payment of incapacity benefits for the period from September 18, 1993 (the date the insurer ended weekly payments without prejudice) until the date of the conference order. The conference order is conclusive as to incapacity for that period; the employee therefore is precluded from seeking benefits for that time. The employee's filing of the present claim is not a refiling of the same claim, as it may address only incapacity subsequent to the scope of the denial of payment. However, the inference that "No liability" is the premise for that 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 (1868). The inference of a "No liability" finding here is anything but "inevitable"; it is pure speculation.

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, s. 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. At 234, citing Sargent'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.

Aguiar, supra at 108-109.

The only pertinent statutory authority, § 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 . . ."), supports the view of preclusion that the reviewing board has taken until today. A party cannot "accept" anything that is not contained – explicitly or by inevitable inference – in the conference order.

In my view the administrative judge's decision does not abandon the application of res judicata in this workers' compensation case, but accurately interprets the law of preclusion regarding § 10A conference orders. Thus, I would affirm the decision.

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William A. McCarthy
Administrative Law Judge