COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039535-96**

Michael Rinaldo	Employee
Suburban Masonry	Employer
Travelers Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Horan and Fabricant)

APPEARANCES
Gillian B. Schiller, Esq., for the employee at hearing
Jonathan R. Harris, Esq., for the employee on appeal
Donna J. Gully-Brown, Esq., for the insurer

McCARTHY, J. The employee's attorney appeals from an administrative judge's decision denying and dismissing his third party claim for payment of expenses. An earlier §10A conference order had directed their payment. The insurer argues that the conference order is unenforceable because prior to the attorney's submission of his expenses to the insurer, the hearing decision issued denying and dismissing the employee's claim. For his part, employee's counsel argues that although the hearing decision reversed the conference order, the award of attorney's expenses is an obligation that no subsequent order or decision could alter. We agree with the insurer that the employee's attorney had the burden of submitting his request for payment of legal expenses pursuant to the conference order prior to the filing of the § 11 hearing decision. We therefore affirm the administrative judge's decision in this case of first impression.

On April 30, 1997, an administrative judge filed a § 10A conference order awarding the employee § 35 temporary partial incapacity benefits, a legal fee, and attendant expenses. Cross appeals were taken and the insurer initiated payment of the employee's weekly partial incapacity benefits. The attorney's fee of $1,148.01 was paid on or about May 12, 1997. (Dec. 2.)

By hearing decision filed on February 25, 1999, the administrative judge reversed his § 35 conference order and denied and dismissed the employee's claim for benefits.[1] On September 8, 1999, more than two years after the conference order and more than six months after the filing of the hearing decision, the employee's attorney made a written demand to the insurer for payment of expenses pursuant to the conference order. The insurer denied payment. Id.

Thereafter, employee's counsel filed a third party claim for payment of expenses, which was denied at a § 10A conference. (Dec. 2-3.) The employee's attorney appealed and, after a hearing, the judge found that the 1997 conference order no longer had legal force because, prior to the submission of the expenses to the insurer, the order had been reversed and vacated. (Dec. 3.) The judge then denied and dismissed the third party claim for expenses associated with the 1997 conference order. (Dec. 4.)

The employee's attorney appeals to the reviewing board. While conceding that the hearing decision reversed the 1997 conference order, he argues that it did not expressly reverse the award of his expenses. Furthermore, he contends that because they were submitted after the order was reversed at hearing, there is no authority for the administrative judge's holding that the insurer is no longer responsible to pay legal expenses pursuant to the § 10A conference order. We disagree.

General Laws c. 152, § 12(1), provides guidance when it states:

> Whenever any party in interest presents a certified copy of an order or decision of a board member…the court shall enforce the order or decision, notwithstanding whether the matters at issue have been appealed and a decision on the merits of the appeal is pending. ***In the event that the order or decision is reversed on appeal, the enforcement order shall be deemed vacated and unenforceable from the date of such reversal.***

(Emphasis ours.) Enforcement of conference orders or administrative judges' decisions rests with the superior court department. Reversal at some later point in the dispute resolution process vacates an earlier superior court enforcement order.

[1] Our review of the board file indicates the employee did not appeal the hearing decision. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

If the enforcement order is thus rendered toothless, so too is the original conference order.

It is well settled that if the language of a statute is clear and unambiguous, it must be given its ordinary meaning. Jinwala v. Bizzaro, 24 Mass. App. Ct. 1, 4 (1987). The statutory language itself is the principal source of insight into the legislative purpose. Also, where the language of the statute is plain and unambiguous, as here, legislative history is not ordinarily a proper source of construction. Hoffman v. Howmedica, Inc., 373 Mass. 32, 37 (1997).

Here, because the insurer has conceded that it never paid the expenses that were due under the terms of the 1997 conference order, it is beyond dispute that the mandatory language of the statute would, ordinarily, require enforcement. However, given the plain language of the statute relevant to an order reversed on appeal, the use of the word "shall" renders the imposition of its enforcement "unenforceable from the date of such reversal." G. L. c. 152, § 12(1).

The judge determined that the insurer was no longer responsible to pay expenses pursuant to the conference order, reasoning that,

> [b]y not submitting expenses for payment prior to the de novo hearing decision Ellis & Ellis had placed their claim for expenses in jeopardy. Ellis & Ellis had a responsibility to properly and timely pursue its rights with respect to the conference order. This was not done. The insurer should not be required to pay these expenses.

(Dec. 3-4.)

We agree. There is no disputing that the conference order on the employee's underlying claim was completely reversed at hearing. (Dec. 2.) Once reversed, the insurer owed nothing to the employee or to his attorney on the related claim for expenses. See Batson v. Beth Israel Hosp., 16 Mass. Workers' Comp. Rep. 446, 450 (2002)(requirement for payments ceased, *nunc pro tunc*, with issuance of hearing decision denying claim.)

As the judge's dismissal of the claim was not arbitrary, capricious or contrary to law. G. L. c. 152, §11C, the decision is affirmed.[2]

So ordered.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: ***November 1, 2007***

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Bernard W. Fabricant
Administrative Law Judge

[2] We note that the insurer also raises the equitable defense of laches relevant to the employee attorney's responsibility to properly and timely pursue his legal expenses. Although we are attracted by the argument, we need not address it as we affirm the judge's decision on different grounds.