COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032728-03**

Paul Levesque (deceased)	Employee
Maureen MacFadden, Administratrix	Claimant
State Road Cement Block Co., Inc.	Employer
Travelers Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan[1] and McCarthy)

APPEARANCES
Peter Smola, Esq., for the claimant
Gerard S. Lobosco, Esq., for the insurer
Richard D. Wayne, Esq., for the employer

HORAN, J. The claimant filed a § 28 claim against the employer and insurer. As best we can tell from the briefs of the parties, a settlement was reached and tentatively approved by the judge. The claimant wished to review structured settlement proposals prior to formalizing the agreement, and the matter was continued for a lump sum conference. Prior to the date of that conference, the claimant had a change of heart, and communicated her desire to litigate, rather than settle, the § 28 claim.

The insurer and employer filed a motion requesting the administrative judge to declare the matter settled, and to approve the agreement. On December 15, 2005, the judge issued a "Ruling and Order" denying the joint motion to approve the proposed lump sum agreement "[g]iven the fact that the claimant in this matter has indicated she is no longer satisfied with the terms of the settlement." The judge's denial of the motion

[1] This case was initially assigned to a panel comprised of Judges Horan, Carroll and McCarthy. The proposed decision of that panel, with a dissenting opinion, was thereafter circulated to the remaining two members of this Board. These "off panel" members agreed with the proposed dissent. In keeping with our past practice when faced with this scenario, the panel was reconfigured to ensure that our decision reflected the view of the Board's majority. Kerstgens v. Babson College, 20 Mass. Workers' Comp. Rep. 141 at n.2 (2006). This is similar to the practice of our Appeals Court's handling of published decisions. See Commonwealth v. Gross, 64 Mass. App. Ct. 829, 830 at n.2 (2005).

did not, therefore, extinguish the claimant's right to proceed with her § 28 claim.[2] In fact, after requesting the matter to be reassigned, in light of his knowledge of the lump sum negotiations, the judge concluded his order by stating, "[t]he matter will proceed in its normal course." Thus, the judge did not intend his denial of the motion to be treated as a § 11 decision, nor can his denial of the motion be properly viewed as one, even if all parties agree.[3]

The employer[4] filed an appeal of the judge's order to this board. The claimant argues the employer's appeal is interlocutory, and that the "matter procedurally is improperly before the Review Board."[5] (Claimant br. 2.) We agree. Our workers' compensation act does not grant administrative judges the authority to report issues to the reviewing board which may be dispositive of a claim.[6] Nor does it vest the reviewing

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[2] Allowance of the motion would have been dispositive of the claim, resulting in a final decision subject to appellate review under § 11C.

[3] Cf. Cricenti v. Weiland, 44 Mass. App. Ct. 785, 789-790 (1998)(subject matter jurisdiction cannot be conferred upon a court by consent, conduct or waiver); Williams v. Attleboro Mutual Fire Ins. Co., 31 Mass. App. Ct. 521 (1991), citing Patry v. Liberty Mobilhome Sales, Inc., 15 Mass. App. Ct. 701 (1983)(even where parties are silent on issue, courts must consider issue of subject matter jurisdiction *sua sponte*). According to the judge presiding at the pre-transcript conference, all parties agreed to treat the judge's order as a decision subject to an appeal to this board. The pre-transcript conference ("PTC"), is not a creature of statute, but of our long established practice to meet with litigants following the docketing of an appeal. The parties appear to discuss the issues likely to be addressed in their briefs, are advised of the briefing schedule and the board rules governing appeals, and are asked to timely report back to the judge should their case settle. There is no authority in our workers' compensation act, or the applicable regulations, to limit parties to the legal positions they take at a PTC.

[4] The insurer did not appeal from the denial of the motion to approve the proposed lump sum agreement.

[5] The claimant also asserts that employer's counsel indicated to the judge (off the record) that "he would preserve his right to appeal any adverse order by the (judge) on (his motion) until the time that a decision was rendered" on the § 28 claim. (Claimant br. 2.) There is nothing in this limited record to counter this assertion.

[6] Cf. General Laws c. 231, §§ 108, 111. Section 108 provides, in pertinent part:

> Any party to a cause brought in . . . any district court, aggrieved by any ruling on a matter of law by a trial court justice, may as of right, appeal the ruling for determination by the

board with the authority[7] to hear appeals from anything other than decisions by administrative judges. G. L. c. 152, § 11C. Accordingly, this case must be recommitted for hearing and a decision on the § 28 claim.[8] See Assuncao's Case, where the Supreme Judicial Court, *sua sponte*, raised the issue of the propriety of an appeal taken from a Superior Court order enforcing the terms of a conference order issued under G. L. c. 152, § 7. The court held that "[s]ince the order of enforcement is *interlocutory in nature* and since there is *no specific authorization for review* of such an order at this stage of the proceedings, the appeal must be dismissed." 372 Mass. 6, 11 (1977)(emphasis added.)

In summary, under G. L. c. 152, § 11, administrative judges render decisions with respect to the issues before them. This board is authorized to hear appeals only from

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> appellate division pursuant to the applicable rules of court. . . . If a trial justice is of the opinion that an interlocutory finding or order made by him ought to be reviewed by the appellate division before any further proceedings in the trial court, he may report the case for that purpose and stay all further proceedings except as necessary to preserve the rights of the parties.

Section 111 of G. L. c. 231 provides, in pertinent part:

> If a justice of the superior court is of the opinion that an interlocutory finding or order made by him so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court, he may report such matter to the appeals court, and may stay all further proceedings except such as are necessary to preserve the rights of the parties.

[7] Cf. General Laws c. 231, § 118, which provides, in pertinent part:

> A party aggrieved by an interlocutory order of a trial court justice in the superior court department, the housing court department, the land court department or the probate and family court department may file, within thirty days of the entry of such order, a petition in the appropriate appellate court seeking relief from such order. A single justice of the appellate court may, in his discretion, grant the same relief as an appellate court is authorized to grant pending an appeal under section one hundred and seventeen.

[8] Had this been done, and the claim failed, the settlement issue would be moot. The same would hold true if the judge formally approved a lump sum agreement endorsed by the parties. If, on recommittal, the § 28 claim is successful, the insurer and employer will have the opportunity to appeal and raise the issue of the proposed settlement's enforceability.

decisions of administrative judges.[9] G. L. c. 152, § 11C. Because there is no decision dispositive of the merits of the § 28 claim, we cannot entertain the employer's "appeal" of the judge's ruling on the motion to approve the proposed lump sum settlement agreement.[10] As we lack jurisdiction to hear appeals from interlocutory orders, we recommit the case for a decision on the § 28 claim.[11]

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **February 16, 2007**

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[9] We interpret the use of the word "decision" in § 11C to mean a decision filed following a formal hearing "with respect to the issues before" the judge "at the conclusion of the hearing." G. L. c. 152, § 11.

[10] The dissent suggests that we have determined the judge erred when he "split the two issues" of § 28 and the lump sum settlement's enforceability. We say nothing of the sort. Trial judges have the option of bifurcating disputes. The dissent confuses bifurcation with the issue of our authority to hear interlocutory appeals. Here, bifurcation and treatment of the threshold issue did not result in a dispositive ruling on the merits of the underlying claim. Therefore, the employer's appeal is interlocutory. Had the judge approved the proposed settlement over the claimant's objection, it would have disposed of the § 28 claim pending appeal to this board. Simply put, we hold today that we have no statutory authority to hear interlocutory appeals. Adoption of the dissent's view would permit a party to appeal from any adverse determination at hearing prior to a final decision on the merits. For example, in a bifurcated hearing, an insurer could appeal from an adverse preliminary finding on issues such as coverage, employee status, and whether the industrial accident happened as described by the employee – just to name a few. Interlocutory appeals such as these would effectively prevent the judge from issuing an award of benefits to the employee pending an appeal to, and a decision by, this board. See Cerasoli v. Hale Development, 13 Mass. Workers' Comp. Rep. 267 (1999). There is nothing in G. L. c. 152, which leads us to conclude the legislature has sanctioned this scenario. To the extent Cerasoli permitted such an appeal, we decline to follow it.

[11] We recommit the case to a different administrative judge for a hearing on the § 28 claim.

McCARTHY, J., (dissenting) On January 9, 2006, the then senior judge received a letter from counsel for the employer, State Road Cement Block Co., Inc. Enclosed with the letter was an "Interlocutory Appeal from [an] Administrative Judge's Order Denying Employer's (and Insurer's) Motion To Enforce [a] Lump Sum Agreement" and a check in payment of the filing fee for an appeal to the reviewing board. The senior judge assigned the case to me for handling.[12] Counsel for the claimant, the insurer and the employer came before me for a status conference in Boston on March 20, 2006. At this conference, all parties agreed to treat the administrative judge's RULING AND ORDER as a decision filed under § 11 of the Act.[13]

With the understanding that the issue of the enforceability of the proposed lump sum would be bifurcated from the § 28 claim, all parties filed briefs in due course. The case was then assigned to a panel and the panel majority has determined that it was error to split the two issues. I think otherwise.

Bifurcation is a useful tool, which is endorsed by the reviewing board from time to time. See Wyman v. Courier Citizen Co., 9 Mass. Workers' Comp. Rep. 333, 341 (1995)("Since we conclude that § 7A as most recently amended does not require as a precondition to its effect that causal relationship of the employee's death to the work

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[12] The RULING AND ORDER filed on December 15, 2005, by the administrative judge is in part as follows:

> . . . [A]fter hearing the parties and after a careful review of the submissions of the parties, the Employer's/Insurer's Motion to Enforce Lump Sum Agreement is DENIED.
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> In its brief the employer cites Donovan v. Liberty Mutual Insurance Company, 14 Mass. Workers' Comp. Rep. 252 (2000). In that matter a lump sum was enforced after an insurer refused or declined to sign a lump sum agreement. This matter is distinguishable. Section 48 mandates that no lump sum be perfected until and unless approved by an administrative judge or administrative law judge as being in the claimant's best interest. Given the fact that the claimant in this matter has indicated that she is no longer satisfied with the terms of the settlement, I can not therefore in clear conscience enforce the lump sum. . . .

injury be established, the administrative judge may, in the interest of efficiency, wish to bifurcate the hearing"); O'Connell v. U.S.V. Pharmaceutical, 9 Mass. Workers' Comp. Rep. 548, 549 (1995)("The . . . administrative judge may want to bifurcate the de novo hearing to first determine whether the employee's failure to give notice and file a claim pursuant to the requirements of § 41 is redeemed by the exculpatory provisions of § 49").[14]

I am not persuaded by the majority's reference to how the courts of the commonwealth handle questions of interlocutory appeals. While there are many similarities between dispute resolution here at the board and in the courts, there are also significant differences. Here different issues surface as time passes. A claim for weekly incapacity benefits under §§ 34 or 35 is often followed by an insurer's complaint to modify or terminate, or an employee's claim for payment of medical expenses. Disputes arise over specific benefits under § 36 and, if significant incapacity persists, a claim for permanent and total incapacity benefits is likely. These issues are tried as they arise and, once decided, may be appealed to the reviewing board. In fact, in at least one instance we heard an interlocutory appeal from a decision in which the issues were bifurcated and the hearing decision was not dispositive of the entire claim. See Cerasoli, supra (reviewing board heard appeal of decision on preclusive effect of conference order, though decision had not addressed bifurcated issue of original liability, which was still

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[13] In his brief to the reviewing board, claimant's counsel reversed his ground and objected to the bifurcation and the interlocutory appeal contending that it " . . . is a tactic intended to forestall employee's [sic] right to a timely § 28 [h]earing." (Claimant's rebuttal br. 2.)

[14] While bifurcation is a useful tool, it may be time to examine the ongoing value of the so-called pre-transcript conference, which was created by 452 C.M.R. § 1.15(3). The conference was useful when there were over fourteen hundred cases awaiting action by the new reviewing board and it often took several years from date of appeal to reviewing board decision. Happily, that is no longer the case. Transcripts are most often ready in a matter of days after the conclusion of the hearing and cases are assigned to a reviewing board panel in about sixty days after briefing is complete. Moreover, the majority opinion makes it clear that the procedural path laid out by an administrative law judge acting for the reviewing board at the pre-transcript conference may be rejected by the panel later assigned to the § 11C review. It may be that the time and effort involved by the judges and lawyers might be better spent in other pursuits.

pending). Contrary to the majority's assertion, this practice does not allow a party to appeal from any adverse hearing determination prior to a final decision on the merits, but only from such determinations where the judge has decided that bifurcation would serve the interests of judicial economy and justice. In the instant case, allowing the reviewing board to hear the employer's appeal does not deprive the claimant of weekly benefits (§ 31 benefits are already being paid), but only postpones decision on the issue of entitlement to double compensation. Moreover, only by allowing the appeal to go forward will the propriety of the judge's denial of the proposed lump sum agreement be determined.

Assuncao's Case, 372 Mass. 6 (1977), cited by the majority for the proposition that the reviewing board has no authority to hear an interlocutory appeal, is inapposite. There, the Supreme Judicial Court based its refusal to hear an appeal challenging the superior court's enforcement of an administrative judge's conference order under then § 11 (current version in c. 152, § 12 [1991]), on the failure of the parties to exhaust their administrative remedies. The case did not address the issue of whether the reviewing board may hear an appeal of a single issue from an administrative judge. The court wrote:

> [W]e will not decide a workmen's compensation case on the merits unless the record demonstrates that the parties have exhausted their available administrative remedies. . . . [A]llowing the administrative process to run its course before permitting full appellate review gives the administrative agency in question a full and fair opportunity to apply its expertise to the statutory scheme which, by law, it has the primary responsibility of enforcing.

Id. at 8-9.

I find nothing in the statute or our regulations, which requires that every possible issue be bundled together for hearing and decision. The agreement to treat the RULING AND ORDER issued by the administrative judge as a decision made practical sense. While there are a number of cases dealing with the enforceability of lump sum settlements where there is a meeting of the minds but before approval by a judge, the bulk of the cases to date involve an insurer refusing to go forward, most often because the

employee has died. This is the first case where it is a claimant rather than an insurer who has reneged on a prior oral agreement to accept a lump sum.[15] The majority, in my view, builds more rigidity into our system to the detriment of the dispute resolution process as practiced here.

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William A. McCarthy
Administrative Law Judge

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[15] The majority maintains that the employer intended to preserve his right to appeal a denial of the motion to enforce the lump sum agreement until after a decision on the § 28 claim (see footnote 5, supra), despite the majority's opinion that a decision on the merits of the § 28 claim would moot the settlement issue (see footnote 8, supra). If the latter is true, under the majority's holding the parties will have no opportunity to have the issue of the lump sum's enforceability decided.