COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038857-90**

Antonio J. Correia	Employee
Revoli Construction Co., Inc.	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein & Carroll)

APPEARANCES
Karen S. Hambleton, Esq., for the employee
Andrew P. Saltis, Esq., for the insurer

LEVINE, J. This case presents the question of whether the employee's attorney was properly awarded a hearing fee, pursuant to G.L. c. 152, § 13A(5), when the insurer's appeal of a conference order was not perfected but a hearing was nevertheless scheduled. We hold that a fee should not have been awarded, and we reverse the decision awarding it.

At a conference held pursuant to G.L. c. 152, § 10A, an administrative judge ordered the insurer to pay the employee § 34A permanent and total incapacity benefits. (Dec. 2.) Although the insurer filed an appeal of that conference order, the Department of Industrial Accidents never received the insurer's payment for the impartial medical evaluation required under § 11A of the Act,[1] Id., and the Commissioner of the department denied both of the insurer's requests for permission to file a late appeal. (Dec. 3.) As a result, the insurer's

[1] General Laws c. 152, § 11A, as amended by St. 1991, c. 398, § 30, states in relevant part:

> When any claim . . . involving a dispute over medical issues is the subject of an appeal of a conference order . . ., . . . an impartial medical examiner [shall] . . . examine the employee. . . . The insurer . . . who files such appeal shall also submit a fee . . . to defray the cost of the medical examination. . . .

appeal of the conference order was never perfected. Despite this failure, a hearing de novo was scheduled. (Dec. 2.) The parties attended, but there was no medical evidence, even though the insurer's appeal was based solely on medical grounds, because no impartial examination had taken place. (Dec. 4.) The judge thereafter, on December 16, 1996, issued a hearing decision denying and dismissing the insurer's appeal because the insurer did not offer any medical evidence. Id. The December 16, 1996 decision, which was silent as to the award of attorney's fees, was not appealed by either of the parties. Id.

Subsequently, the employee's attorney brought a claim for an attorney's fee pursuant to § 13A(5).[2] In her hearing decision on that claim, the judge found that the employee had prevailed at the prior hearing entitling his attorney to the statutory fee, which she reduced because the employee prevailed "without the need for lay testimony or depositions." (Dec. 11.)

We reverse the decision relying on the authority of Kowalczyk v. Morgan Construction Co., 13 Mass. Workers' Comp. Rep. 284 (1999). In Kowalczyk, as in the present case, an administrative failure resulted in the scheduling of a hearing on the conference appeal, notwithstanding the fact that it was not ready for assignment. As we stated in that decision:

> The insurer argues that the judge exceeded his authority by holding a hearing and filing a decision when the claim was not properly before him. We agree. As the fee required by § 11A ($350.00) was not paid, the appeal from the adverse conference order was not perfected. The fee unpaid, no impartial medical examination can take place and thus no medical report can be provided to the judge and the parties. In the absence of such a report, a hearing cannot be scheduled. [Citations omitted.] General Laws c. 152, § 11A(2) provides in pertinent part as follows:

[2] General Laws c. 152, § 13A(5), as amended by St. 1991, c. 398, § 35, states in relevant part:

> Whenever an insurer . . . contests a claim for benefits and then . . . the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney in an amount equal to three thousand five hundred dollars, plus necessary expenses.

> The impartial medical examiner, so agreed upon or appointed, shall examine the employee and make a report at least one week prior to the beginning of the hearing, which shall be sent to each party. No hearing shall be commenced sooner than one week after such report has been received by the parties.
>
> The administrative judge lacked jurisdiction to convene a hearing and to file a decision under § 11.

Id. at 285.

As no hearing could be convened, and no decision filed, it necessarily follows that no hearing fee under § 13A(5) could be due. The fact that the insurer did not withdraw its appeal of the conference order in a timely fashion is beside the point, where no perfected appeal existed in the first place.

We reverse the decision awarding the § 13A(5) attorney's fee.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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