COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 043739-89**

Bruce H. Davidson	Employee
Florida Medicaid	Third Party Claimant
S.C. Management Corp.	Employer
National Fire Ins. Co. of Hartford/CNA Ins. Co.	Insurer
Workers' Compensation Trust Fund	Intervenor

REVIEWING BOARD DECISION

(Judges Harpin and Koziol)[1]

The case was heard by Administrative Judge Heffernan.

APPEARANCES

Charles E. Berg, Esq., for the employee and the third party claimant at hearing[2]
James N. Ellis, Sr., Esq., for the employee on appeal[3]
Douglas K. Birkenfeld, Esq., for the insurer at hearing
Martin T. Sullivan, Esq., for the insurer on appeal
Judith A. Atkinson, Esq., for the Workers' Compensation Trust Fund[4]

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[1] Administrative Law Judge Horan was on the original panel, but no longer serves at the department.

[2] The third party claimant did not file a notice of appeal and did not file a brief on appeal.

[3] Attorney Ellis filed a Form 114, "Notice of Change/Appearance of Counsel" on behalf of the employee the same day that he filed the employee's Form 112 "Appeal to Reviewing Board." Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). On October 2, 2015, after the appellate briefs were filed, Attorney Nicholas J. Ellis filed a Form 114, "Notice of Change/Appearance of Counsel" on behalf of the employee. Attorney James N. Ellis, Sr. has not filed Form 114 "Notice of Change/Appearance of Counsel" indicating he has been replaced and is withdrawing from representation of the employee.

[4] The Workers' Compensation Trust Fund's brief argues solely for affirmance of the judge's decision denying the § 30 claims of the third party claimant and employee. We do not address its arguments pertaining to the validity of the lien of the third party claimant, Florida Medicaid, or the alleged lack of standing of Xerox Recovery Service to assert the claim for reimbursement

HARPIN, J. The employee and the insurer cross-appeal from a decision denying and dismissing the employee's claim for the insurer to assume the costs of the employee's continuing need for long-term care pursuant to § 30, ordering the insurer to reimburse the costs of obtaining a guardianship over the person and property of the employee pursuant to § 39, and an award of an attorneys fee pursuant to § 13A(5). We affirm the decision.

We briefly recount the procedural history of this claim.[5] The employee was injured on May 30, 1989, while working as a custodian for the employer in Gardner, Massachusetts. On that date, he developed blisters on his left foot and big toe resulting from burns he received while walking for a prolonged period on a hot tar roof.[6] (Dec. III, 11.) Despite receiving medical treatment, the employee developed "ulcers, systemic

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on behalf of the third party claimant, because those issues are mooted by the third party claimant's failure to appeal from the judge's decision denying its claim.

[5] There have been three hearing decisions in this case. Hereinafter, we refer to them as follows: the first hearing decision, December 30, 1991, is referred to as "Dec. I;" the second hearing decision, August 29, 1996, is referred to as "Dec. II;" and, the third hearing decision, April 28, 2015, is referred to as "Dec. III."

[6] As of May 30, 1989, the employee had the following past medical history:

> He underwent laminectomies in 1968 following injury to his back in an industrial accident.
>
> In 1976 he slipped on the steps of the post office in Gardner, and fell on his head and back. From that time up into 1984 he underwent multiple neuro and orthopedic surgical procedures to his back, spinal nerves, and brain in an effort to relieve the injuries suffered in that fall.
>
> The several operations have permanently impaired the functioning of his central nervous system. His bladder is dysfunctional, necessitating self-catherization [sic]. He suffers neuropathy in his lower extremities, and experiences a partial loss of sensation in his right leg and foot, and near total loss of sensation in his left leg and foot.

(Dec. I, 7.)

infections and osteomyelitis of the left big toe." (Dec. II, 11.) Pursuant to a hearing decision filed by Judge Gromelski on December 30, 1991, the insurer was ordered to pay the employee § 34 benefits as a result of his left foot condition and related depression.[7] (Dec. III, 12.)

While the matter was pending before Judge Gromelski, the employee underwent an amputation of his left big toe on January 16, 1991, "in an attempt to prevent further systemic infections from entering through the non-healing ulcer on the toe." (Dec. III, Ins. Ex. 1; Dec. I, 14.) Thereafter, he "underwent an amputation of the left leg and shin, progressing to a below knee amputation." (Dec. III, 12.) On September 29, 1994, Judge O'Shea approved a lump sum settlement agreement between the employee and insurer, whereby the insurer accepted liability for the employee's left below knee amputation and depression. (Dec. III, 12, Ins. Ex. 2.) On August 3, 1995, the insurer and the Workers' Compensation Trust Fund (WCTF), entered into a § 37 agreement, (Dec. III, 4), whereby the WCTF agreed to reimburse the insurer 67% of all medical expenditures paid on behalf of the employee. (Dec. III, 2, 8; Ins. Ex. 6.) On November 27, 1996, Judge O'Shea dismissed the employee's § 30 claim for a morphine infusion pump for lack of prosecution. (Dec. II, 2.) The employee filed the present claim on January 23, 2009, seeking payment of nursing home and related expenses.[8] The matter came before Judge Levine for a § 10A conference, and, on May 13, 2009, he denied the claim. Rizzo, supra. The employee appealed to a hearing de novo. Later, the matter was reassigned to Judge Heffernan for the hearing.

On November 9, 2011, the employee filed a motion to join claims for §§ 39 and 13A benefits, which the judge allowed. (Dec. III, 4, 5.) On December 19, 2012, the Department of Industrial Accidents received a Form 115, "Third Party Claim," of

[7] Sometime after the accident, but before the first hearing, the employee and his family moved to Florida. (Dec. I, 6.)

[8] An earlier claim, which sought §§ 13 and 30 "unpaid nursing home and related medical expenses," was filed May 30, 2007, but was administratively withdrawn by the department on June 21, 2007. Rizzo, supra.

"Medicaid of Florida; Agency for Health Care Administration," which sought reimbursement from the insurer in the amount of "$954,547.69 as of November 16, 2012." Rizzo, supra. On May 7, 2013, the employee's hearing counsel filed an additional notice of appearance on behalf of the third party claimant, along with a motion to join the third party claim with the employee's pending claim. Rizzo, supra. The judge allowed that motion. (Dec. III, 12.) Subsequently, alleging that the WCTF was a necessary party to these proceedings by virtue of the § 37 agreement, the insurer filed a motion to join the WCTF. The WCTF, on its own, filed a motion to intervene in the pending hearing. On June 25, 2013, the judge allowed the motion to join over the objection of the third party. (Dec. III, 9.)

The hearing was conducted over two days, September 20, 2013, and April 17, 2014. (Dec. III, 14.) At the hearing, the employee, through his daughter and guardian Micole Davidson-Center, sought medical care and treatment pursuant to § 30 from "2003 to date and continuing and, in particular, the care and treatment of the Employee in a skilled nursing home facility" (Dec. III, 11), and the costs of obtaining guardianship over the person and property of the employee, in the amount of $4,950.00. The third party claimant sought reimbursement of long term care expenses in the amount of $848,946.88. (Dec. III, 3.) The judge denied the § 30 claim for the employee's care and treatment in a skilled nursing facility, as well as the third party claim for reimbursement of $848,946.88. He ordered the insurer to pay $4,950.00, pursuant to § 39, for the cost of the appointment of the employee's daughter as guardian of the employee's person and property. On April 28, 2015, over the insurer's objection, the judge issued a "corrected" decision, additionally ordering the insurer to pay an attorneys fee pursuant to § 13A(5). The employee and the insurer filed cross-appeals.

On appeal, the employee argues the judge erred in his causation analysis by not considering whether his work-related left leg below-the-knee amputation and its sequelae "constitute in any way a contributing factor in causing the need for long-term care." (Employee br. 11). The employee argues the applicable causation standard is: "***whether***

the industrial injury and its complications constitute <u>one</u> of the contributing factors for the employee's need for 24 hour skilled nursing care in a long term care facility" from 2001 and continuing. (Employee br. 16; emphasis original.) We agree that this is the applicable standard, but we do not agree that the judge erred in performing his analysis.. The employee has the burden of proving all the elements of his claim for benefits. Dow v. Berkshire Medical Center, 31 Mass. Workers' Comp. Rep. ___ (October 12, 2017); Sponatski's Case, 220 Mass. 526, 527-528 (1915). When seeking payment for medical treatment, the employee must show that the treatment is causally related to his industrial injury. Dow, supra. When the standard is "simple" causation, as here, the requirement is that the adopted medical evidence provide at least the probability of a causal relationship between the treatment and the injury. Georgian v. Windham Group, 30 Mass. Workers' Comp. Rep. 189, 194 (2016); Beliveau v. Top Flite Golf Co., 23 Mass. Workers' Comp. Rep. 141, 143 (2009) (simple causation requires only that industrial injury be a cause of incapacity or treatment); see also Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109, 111 (1997).

The judge was presented with conflicting medical evidence. In his thorough decision he commented on, and pointed out the deficiencies he found in the opinions rendered by the employee's physicians, including those rendered in the record review performed by Dr. Harvey Clermont. (Dec. III, 16-21.) For example, the judge found:

> Dr. Clermont did not explain why the Employee was able to live independently with an amputation for several years with family and then on his own with visiting nurses and PCA's assisting until 2003. In addition, he did not point out the change in medical condition that caused the Employee the need to be placed in a nursing home.

(Dec. III, 20.) The judge then discussed the opinions set forth in the insurer's record review performed by Dr. Milo Pulde, in particular noting that Dr. Pulde opined there was "no evidence" that the employee's injury and "left below the knee amputation, or any potentially injury related complication caused *or contributed to* his requirements of institutional care and skilled nursing home residency or is responsible for any major

limitations which would preclude the prevention and treatment of any of his complex medical problems and independent living outside of the institutional environment." (Dec. III, 25; emphasis supplied.)

Moreover, the judge's decision shows he found a failure of proof regarding what, if any, of the asserted charges were attributable to the work related condition. The judge found:

> Braxton Wilson was called and questioned by the Employee/Third Party Claimant. Mr. Wilson is employed as a Recovery Manager for Xerox which has asserted a claim for medical bills in the amount of $848,946.88 and ongoing. Xerox receives a commission for monies it recovers on behalf of the Florida Medicaid program. Mr. Wilson has no medical training. He testified that based on his lay review of the medical records and the Florida Medicaid printout of billings that he believed that $848,946.88 of the Employee's treatment was related to the May 30, 1998 incident. These bills included institutional care charges commencing in 2003. Mr. Wilson does not know what medications or treatments that are being claimed were for bipolar disorder, Parkinson's[,] back or other conditions. (Tr. 4/17/2014, p. 49.)
>
> The remaining testimony of Mr. Wilson was carefully noted and considered by me. While his testimony was credible as to the issue of the process followed, I am not convinced that Xerox has provided sufficient evidence that the charges which it is seeking to recover are related, fair or reasonable and necessary as related to the Employee's work related injury of May 30, 1989.

(Dec. III, 26.)

The judge adopted Dr. Pulde's opinion that "the Employee and Third Party claimed expenses associated with 24-hour skilled nursing care in a long term care facility since 2001 and continuing are not causally related to the May 30, 1989 work injury." (Dec. III, 28.) There was no error, for the opinion of no causal relationship defeats even simple causation.

The insurer argues the judge erred by ordering it to pay for the costs associated with the appointment of the employee's daughter, Michole Davidson-Center, as the legal guardian of the employee's "person and property," (Dec. III, Employee Ex. 5), because the appointment was not necessary to prosecute the employee's claim, which was filed in

2009, three years before the 2012 appointment. It asserts that the Florida Healthcare Administration was "the real party in interest in this case and the FAHA is clearly not in need of a guardian." (Insurer's br. 8). It also argues that Ms. Davidson-Center testified she sought the appointment so that she could "be able to better monitor [the employee's] healthcare, not to advance a claim under chapter 152." (Insurer's br. 7). We find no error.

Contrary to the insurer's allegations, the employee's claim, in which he sought an order from 2003 to date and continuing and, in particular, the care and treatment of the Employee in a skilled nursing home facility, stood independent of the third party claimant's reimbursement request, which was not filed until December 19, 2012, and not joined to the employee's pending claim until May 7, 2013. (Rizzo, supra.; Dec. III, 12). The § 39 claim was joined to the case in 2011, when Ms. Davidson-Center was seeking to be appointed as the permanent guardian of the employee. Rizzo, supra. As of that date, the employee's appeal from the conference order denying his claim was pending a hearing. The employee's attorney no doubt needed input from his client regarding the litigation and handling of this case, including the provision of testimony in support of the claim at the subsequent hearing, and certainly in determining whether or not to proceed with an appeal. See Pileeki v. Jerry Constr. Co., 25 Mass. Workers' Comp. Rep. 21 (2011)(where employee moved to join claim for § 39 benefits on the ground his unrelated medical condition caused an incapacity to testify, thus prohibiting his appearance at hearing, the judge erred by dismissing claim based on employee's failure to appear at hearing, without addressing his request to join § 39 claim). An employee's right "to receive worker's compensation benefits is not extinguished by [his legal incapacity]." See Lopes's Case, 74 Mass. App. Ct. 227, 229 (2009) (error to refuse request for insurer to furnish legal services for appointment of administratrix in order to allow prosecution of decedent's claim). We have determined that in order to support an award of § 39 benefits, prosecution of the workers' compensation claim does not need to be the only reason for seeking the appointment of a legal representative. Toto v. Town

of Barnstable, 24 Mass. Workers' Comp. Rep. 203, 205-206 (2010)(noting 1937 statutory amendment to § 39 "no longer conditioned an insurer's . . . liability for § 39 payments on whether the appointment of a legal representative was 'not otherwise required'. ") "Because the [guardian's] appointment was required to properly pursue the claims advanced on behalf of [the employee]," the judge did not err by determining that payment was required pursuant to § 39. Toto, supra at 206.

The insurer advances two arguments in support of its assertion that the judge erred by ordering payment of a § 13A(5) attorney's fee for the employee's successful prosecution of his claim for reimbursement of the costs incurred in securing his daughter's appointment as his legal guardian. First, the insurer asserts, apparently for the first time,[9] that attorney's fees are due only where the employee prevails on a "claim for benefits," and "benefits" are synonymous with "compensation." (Ins. br. 10.) The insurer argues there is no case law establishing § 39 as "compensation" under the Act; therefore, § 39 should not be viewed as "the payment of compensation." Rather, § 39 should be viewed as a "claim for [payment of] a [an attorney's] fee" under § 13A. Accordingly, it concludes, pursuant to § 10(1),[10] no attorney's fee is due. (Ins. br. 10-11.) The employee, in response, points to Thayer's Case, 345 Mass. 36 (1962), in support of his claim that § 39 benefits fall within the definition of "compensation" payable under §§ 26 and 28. Id. at 42-43 n.5 (identifying § 39 as an example of "compensation" referred to in §§ 26 and 28 of the Act).

Whether § 39 falls within the definition of "compensation" under the Act is irrelevant in determining whether an attorney's fee is due when the employee prevails on

[9] The insurer's closing argument to the judge proffered only one reason why attorney's fees could not properly be awarded in this case, which is addressed by the insurer in its second argument on this issue, infra. Because both arguments rely on § 10(1), and the newly proffered argument deals solely with an issue of law, we address this newly asserted claim of error.

[10] General Laws, c. 152, § 10(1), states in pertinent part:

> No attorney's fee shall be due for any claim solely involving unpaid attorney's fees or expenses for past due services.

a claim seeking such benefits. For example, § 34B cost of living adjustments have been deemed not to be "compensation," but a supplemental benefit due the employee. Armstrong's Case, 416 Mass. 796, 800 (1994). Yet an attorney's fee under §13A(5) would be due in any case where an employee's entitlement to payment of the cost of living adjustment was disputed by the insurer and the employee prevailed at hearing by obtaining an order for payment of that benefit. Section 39 clearly provides a benefit to employees by ensuring that legally incapacitated employees obtain the appointment of a guardian who can pursue their claim for benefits due under the Act when they are unable to do so. Moreover, § 39 requires the insurer to

> furnish or pay for legal services rendered in connection with the appointment of such . . . guardian . . . or in connection with his duties, and shall pay the necessary disbursements for such appointment, the necessary expenses of such . . . guardian . . . , and reasonable compensation to him for the time necessarily spent in complying therewith. Said payments shall be in addition to sums paid for compensation.

Thus, the statutory language provides for more than just payment of legal services, and imposes obligations not present in § 13A.

> "Furnish" means to provide or supply. Its significance may vary with the connection in which it is found. It is used here to describe a duty placed upon an insurer respecting a workman who receives 'a personal injury arising out of and in the course of his employment." Such a person manifestly is presumed by the act to be under more or less physical disability and hence not in his normal condition of ability to look out for himself. The word "furnish" in such connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring the injured person the required humanitarian relief.

Panasuk's Case, 217 Mass. 589, 593 (1914); Lopes's Case, 74 Mass. App. Ct. 227, 229 n. 4 (2009)("Section 39 does not specify how the insurer's obligation to 'furnish' such services may be discharged. We assume that the insurer would fulfill its obligation by engaging an attorney on behalf of the putative representative"). The prohibition of payment of attorney's fees under § 10(1) does not contemplate fees and expenses incurred in securing an appointment of a guardian for the employee under § 39. Under

§ 13A, the insurer is under no affirmative duty to "furnish" the employee with legal services pertaining to the underlying workers compensation claim. Thus, the benefits set forth in § 39 are different in kind than the award of an attorney's fee under § 13A. See Mansaray v. City Foods, 16 Mass. Workers' Comp. Rep. 210, 213 (2002)(Section 10(1) prohibited obtaining attorneys fee for time that related to "preparation for the present claim of attorney's fee" for attorney's work performed at an earlier §10A conference).

The insurer has consistently argued throughout the course of the employee's pending claim for § 30 medical benefits that no attorney's fee or expense reimbursement may be ordered if the employee prevailed on his claim, because the employee did not show that he sent his claim for § 30 medical benefits to the insurer by certified mail and the claim was sent to the incorrect address. G. L. c. 152, § 10(1).[11] The insurer thus argues the judge erred by ordering it to pay the employee a § 13A(5) attorney's fee for prevailing at the hearing. We disagree for two reasons. First, the employee did not prevail on the underlying claim upon which the insurer's argument is based. Instead, the employee prevailed on his § 39 claim that was joined for hearing after the employee appealed from the § 10A conference order denying his underlying claim. As a claim joined after a § 10A conference, the matter was not subject to the provisions of § 10(1), which by its own terms discusses filing "with the division of administration and the insurer," the claim's "accept[ance] by the department," and assignment to conciliation and referral to "the industrial accident board following a conciliation." G. L. c. 152, § 10(1)-(6). Second, and most importantly, pursuant to § 13A(10), the prohibition on ordering attorney's fees set forth in § 10(1), applies only to the conciliation and

[11] The employee's brief advances no argument in response to this assertion. General Laws, c. 152, § 10(1), states in pertinent part:

> In order for an attorney's fee to be required under section thirteen A, pursuant to a dispute over a claim for benefits under this chapter, such claim shall have been sent to the insurer by certified mail.

conference stages of the dispute resolution process, not to the hearing stage.[12] Thus, the judge correctly ordered payment of the attorney's fee pursuant to § 13A(5).

The decision of the administrative judge is affirmed. Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel a fee in the amount of $1,654.15, plus necessary expenses.

So ordered.

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William C. Harpin
Administrative Law Judge

_____
Catherine Watson Koziol
Administrative Law Judge

Filed: **March 28, 2018**

[12] General Laws, c. 152, § 13A(10), states in pertinent part:

> The dollar amounts specified in said subsections (1) to (6), inclusive, of this section shall be changed October first of each year by the percentage change in adjusted benefits from the preceding year as calculated and limited in paragraph (a) of section thirty-four B. The department shall provide by rule the necessary expenses that are reimbursable under this section. **No fees shall be payable under subsection (1), (2), (3) or (4) unless the claim subject to the dispute was filed according to the provisions of section ten.**

(Emphasis supplied.)