

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 042033-03**

Bruce Spaniol  
Fairview Commons  
A.I.M. Mutual Ins. Co.

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Rose.

**APPEARANCES**

James Riley Hodder, Esq., for the employee at hearing  
James N. Ellis, Esq., for the employee on appeal  
Kimberly Davis Crear, Esq., for the insurer on appeal

**KOZIOL, J.** The parties cross-appeal from a decision ordering the insurer to reimburse the employee \$1,672.61, or 22% of an award of § 36 permanent loss of function benefits it withheld pursuant to § 13A(10) and 452 Code Mass. Regs. § 1.02,<sup>1</sup> and denying the employee's claim for penalties pursuant to §§ 8 and 14.

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<sup>1</sup> General Laws c. 152, § 13A(10), states in relevant part:

In any instance in which an attorney's fee under subsection (1) to (6), inclusive, is due as a result of a cash award being made to the employee either voluntarily, or pursuant to an order or decision, the insurer may reduce the amount payable to the employee within the first month from the date of the voluntary payment order or decision, by the amount owed to the claimant's attorney; provided, however, that the amount paid to the employee shall not be reduced to a sum less than seventy-eight percent of what the employee would have received within that month if no attorney's fee were payable.

452 Code Mass. Regs. § 1.02, states in relevant part:

Cash Award as used in M.G.L. c. 152, § 13A(10), shall mean any specific compensation benefits payable under M.G.L. c. 152, § 36 or § 36A and any weekly benefits payable under M.G.L. c. 152 of an amount that exceeds the

Because the judge erred in ordering the insurer to reimburse the employee, we reverse the decision in part and vacate the reimbursement award.<sup>2</sup>

On November 19, 2007, the parties attended a hearing on the employee's claim for § 36 permanent loss of function benefits. At that hearing the parties resolved the matter, signing an agreement wherein the insurer agreed to pay the employee \$7,602.77 for his § 36 claim and a negotiated attorney's fee, pursuant to § 13A(5), in the amount of \$2,500. The insurer then paid the employee \$5,930.16, representing the § 36 award of \$7,602.77 minus a 22% reduction to offset payment of the § 13A(5) attorney's fee, pursuant to G. L. c. 152, § 13A(10) and 452 Code Mass. Regs. § 1.02. Thereafter, the employee filed the instant claim seeking reimbursement of the \$1,672.61 withheld from his § 36 award, along with penalties pursuant to §§ 8 and 14.

The present appeal is governed by Vazquez v. Target Corp., 23 Mass. Workers' Comp. Rep. 359, 365 (2009)(regulation's inclusion of § 36 benefits in definition of "cash award" appearing in § 13A(10) is valid as a "legitimate counter-balance to the 'first thirty days of future weekly benefits restriction' "), aff'd Vazquez's Case, 78 Mass. App. Ct. 1112 (2010)(Memorandum and Order Pursuant to Rule 1:28) and Grogan's Case, 76 Mass. App. Ct. 1132 (2010)(Memorandum and Order Pursuant to Rule 1:28)(insurer may offset § 36 award payment by 22% for contribution to a portion of attorney's fee, pursuant to § 13A(10) and 452 Code Mass. Regs. § 1.02). Because § 13A(10) and 452 Code Mass. Regs. § 1.02 allow the insurer to use up to 22% of the § 36 award to offset the attorney's fee due, the judge erred in ordering the insurer to reimburse the \$1,672.61 withheld from the employee's § 36 award. Accordingly, we reverse

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weekly amount being paid the employee for the week immediately prior to the date of the voluntary payment, order or decision.

<sup>2</sup> As a result, we need not address the only issue raised by the employee on appeal: that the judge erred in failing to award the employee a §13A(5) attorney's fee for prevailing in his claim for reimbursement. The employee does not challenge the judge's rulings on the penalty claims.

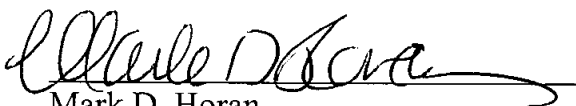
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only the portion of the judge's decision that found the insurer improperly withheld 22% of the § 36 award to offset payment of the employee's attorney's fee, and vacate the order of reimbursement.

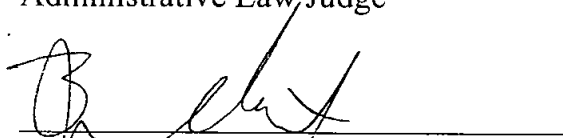
So ordered.



Catherine Watson Koziol  
Administrative Law Judge



Mark D. Horan  
Administrative Law Judge



Bernard W. Fabricant  
Administrative Law Judge

Filed:

