

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 041551-05

Carole Evangelista
James N. Ellis, Sr. d/b/a Ellis & Associates
Community Systems, Inc.
Atlantic Charter Insurance Company

Employee
Third Party Claimant
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Harpin)

This case was heard by Administrative Judge Lewenberg.

APPEARANCES

Steven M. Buckley, Esq., for the employee
Kevin P. Jones, Esq., for the insurer
James N. Ellis, Sr., Esq., for the Third Party Claimant

CALLIOTTE, J. This case is before us on remand from the Massachusetts Appeals Court following our decision in Evangelista v. James N. Ellis, Sr. d/b/a Ellis and Associates, 30 Mass. Workers' Comp. Rep. 71 (2016), for a determination of "the whole cost of the proceedings before the board." Evangelista's Case, 91 Mass. App. Ct. 1112 (2017)(Memorandum and Order Pursuant to Rule 1:28).

The claim before the administrative judge involved a dispute between two attorneys over the distribution of an attorney's fee resulting from the employee's lump sum settlement with the insurer. The employee's first attorney, James N. Ellis, Sr. (Ellis) sought to have the judge recuse himself on grounds of bias, but chose not to appear at the hearing. Accordingly, the judge denied the motion for recusal, and ordered the entire attorney's fee, which was being held in escrow, distributed to the employee's successor counsel, Steven M. Buckley (Buckley). Evangelista, supra.

Attorney Ellis appealed to the reviewing board, alleging error in the judge's refusal to recuse himself. We affirmed the judge's decision. In addition, we found,

pursuant to G. L. c. 152, § 14(1),¹ “the appeal [to the reviewing board] had been put forward by Ellis without reasonable grounds,” as Ellis was attempting to “boycott the hearing in an attempt to ‘disqualify [the administrative judge] by mere accusation.’ ” Evangelista, supra at 76, quoting Ryder’s Case, 80 Mass. App. Ct. 1102 (2011) (Memorandum and Order Pursuant to Rule 1:28). Accordingly, we ordered that the “whole cost of the proceedings,” pursuant to § 14(1), be assessed against Ellis. We determined that the fee authorized by G. L. c. 152, § 13A(6),² was “a fair approximation of the cost of the appellate proceeding,” and ordered Ellis to pay Buckley \$1,618.19. Evangelista, supra.

Both parties appealed to the Appeals Court, but Ellis withdrew his appeal before oral argument. Evangelista’s Case, supra, n. 2. The only issue before the court was whether we properly determined the “whole cost of the proceedings” under § 14(1) “by applying the statutory amount set forth in G.L. c. 152, § 13A(6).” Evangelista’s Case, supra. The court held that the statutory fee payable to an employee, established in § 13A(6), specifically applies only to appeals brought by insurers, and not to appeals brought by “a private attorney disputing the allocation of attorney’s fees and costs in a settled case.” Id. Because “in this context the application of . . . § 13A(6), was error, and . . . \$1,618.19 may not have been the whole cost of the proceedings,” the court remanded the case to us “to determine the whole cost of the proceedings before the board.” Id.

¹ General Laws c. 152, § 14(1)(b), provides, in relevant part:

If any administrative judge or administrative law judge determines that any proceedings have been brought or defended by an employee or counsel without reasonable grounds, the whole cost of the proceedings shall be assessed against the employee or counsel, whomever is responsible.

² General Laws c. 152, § 13A(6), provides:

Whenever an insurer appeals a decision of an administrative judge and the employee prevails in the decision of the reviewing board, the insurer shall pay a fee to the employee’s attorney in the amount of one thousand dollars, plus necessary expenses. An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.

Accordingly, we directed Attorney Buckley to submit, within fourteen days, an affidavit with supporting documentation, describing the fees and costs associated with the appeal. Attorney Ellis was afforded fourteen days thereafter to respond. Buckley submitted a letter, a memorandum, and several pages of documentation on April 4, 2017.³ Ellis did not respond within the allotted time period, or thereafter.

In his memorandum, Buckley first suggests that the costs associated with defending Ellis' lawsuit against the employee in small claims court, which he estimates at \$7,000, should be included in the assessment of costs here. We reject that suggestion. Our decision was that the *appeal before the reviewing board* had been pursued by Ellis without reasonable grounds. Accordingly, only the costs associated with that appeal may be considered.

Next, Buckley proposes:

The entire cost of the proceedings, as appearing in G.L. c. 152, § 14(1)(b), should include not only my efforts, but those of Attorney Ellis, insurers'[sic] counsel, Kevin Jones, the judge, his assistant, and the stenographer. I propose that the penalty imposed amount to five times my individual effort, to account for the three (3) other lawyers involved, (including the judge), and the supporting administrative staff.

(Buckley Memorandum entitled, "G.L. 152, § 14[1][b]: The Whole Cost of the Proceedings"). Buckley cites no authority, nor does he make any argument, in support of his request to include in the § 14(1) assessment of additional costs beyond those he has incurred in pursuing the reviewing board appeal. See Asare v. City of Taunton Nursing Home, 24 Mass. Workers' Comp. Rep. 139, 142-143 (2010)(bare assertion does not rise to level of proper appellate argument and need not be addressed); see also 452 Code Mass. Regs. 1.15(4)(a)(3)("Reviewing Board need not decide questions or issues not

³ Although Attorney Buckley did not submit an affidavit accompanying documentation of his costs as directed, we nonetheless address his request. We note that the Appeals Court does not explicitly require an affidavit to consider a request for attorney's fees and costs. See Evangelista's Case, *supra*, citing Fabre v. Walton, 441 Mass. 9, 10-11 (2004)(in a request for attorney's fees and costs before the appeals court, the claimant may "submit an application for fees and costs, with supporting documentation").

argued in the brief”). Nonetheless, it is within our discretion to address those assertions, and we provide the following analysis.

First, we reject out of hand Buckley’s proposal that Ellis should be required to pay, presumably to Buckley, Ellis’s *own* costs, which Buckley suggests should be determined to be the same as his.⁴ Such an award is speculative, given we have no method of determining those costs. In addition, it is punitive. To the extent § 14(1) may be a penalty provision, it is to be strictly construed. See LaFleur v. Dep’t of Corrections, 28 Mass. Workers’ Comp. Rep. 179, 191 (2014). Because we are aware of no precedent or rationale for such an assessment, we reject this proposal.

Next, we reject Buckley’s request that, in this instance, the assessment of costs include the insurer’s costs. Not only would such an assessment, without documentation from the insurer, also be speculative, but here there were no such costs, as the insurer was not involved in the appeal. The dispute was entirely between the employee’s former and successor attorneys. The insurer did not submit a brief to the Board, nor was there an oral argument requiring its participation.⁵

Attorney Buckley further proposes that “the whole cost of the proceedings” include the efforts of “the judge, his assistant, and the stenographer.” (Buckley Memorandum, supra). This request appears to improperly contemplate an assessment of the costs associated with the hearing, not the appeal that was the actual subject of the § 14(1) order, since it mentions only one judge and his assistant (rather than a panel of the reviewing board) and a stenographer (which was not required on appeal). However, to the extent the proposal can be read to request the Department’s costs for the time and expense of processing Ellis’s unreasonable *appeal*, we agree that “the whole cost of the

⁴ There is nothing in § 14(1) to support Buckley’s inference that, outside of his own costs, any costs that are assessed as part of the “whole cost of the proceedings” should be payable to him.

⁵ That is not to say that, in different circumstances, assessment of the whole cost of the proceedings under § 14(1) might not appropriately include the attorney’s fees and costs incurred by more than one party. Cf. Holden v. Town of Wilmington, 25 Mass. Workers’ Comp. Rep. 165 (2011)(counsel for self-insurance group ordered to pay documented fees and costs to employee and self-insurer for all post-conference proceedings, pursuant to § 14[2]).

proceedings” may include the costs associated with the efforts of all three judges assigned to hear the matter on appeal and their assistants. If oral argument had taken place, costs associated with the efforts of the stenographer could also be included.

We have upheld awards to reimburse the Department for its costs in processing an unreasonable claim or complaint in at least two instances. In Berard v. Sears Roebuck and Co., 1 Mass. Workers’ Comp. Rep. 175 (1987), we upheld an award for “time expended by the Single Member and clerical and stenographic staff,” under a prior, but similar, version of § 14.⁶ There, we reduced the amount of the award, finding that, “[g]iven the limited issue before the Single Member, the single medical deposition and the length of the transcript,” an award of \$4,000.00 was excessive and constituted a penalty. Therefore, we ordered costs of \$750.00 paid to the “Treasurer of the Commonwealth as the whole cost of the proceedings.” Id. at 176-177. Similarly, in Zavalu v. Standard Thompson Corp., 28 Mass. Workers’ Comp. Rep. 235 (2014), we upheld an administrative judge’s award of the equivalent of a conference and a hearing fee, or \$6,373.96, to the insurer for its costs associated with the proceedings, and the same amount to the department for its costs, both amounts to be paid by the employee’s attorney, pursuant to § 14(1).⁷ Id. at 237, 239-240. In so doing, we wrote, “the [employee’s] second claim had no bearing on the preservation of the employee’s rights, and instead served only to waste judicial resources at the department with a claim that

⁶ General Laws c. 152, § 14, as amended by St. 1985, c. 572, § 29, by § 68 made effective Jan. 1, 1986, provided, in pertinent part:

(1) If any member of the board, the reviewing board, or any court before which proceedings under this chapter are brought determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, the *whole cost of the proceedings* shall be assessed upon the party who has so brought, prosecuted or defended them.

(Emphasis added.)

⁷ Our affirmance in Zavalu, supra, of the judge’s measurement of the award of costs using the statutory fees in § 13A would, of course, not pass muster now, given the Appeals Court’s rejection of just that measurement in Evangelista’s Case, supra. Our view here of the amount of costs looks to measurements other than the statutory fees.

had no possibility of resulting in a valid judgment.” Id. at 243, citing Mancuso v. Kinchla, 60 Mass. App. Ct. 558, 569 (2004).

Similarly, here, forcing the board to expend extra time and effort on a frivolous appeal that has no possibility of success, “ ‘threatens the integrity of the judicial process and increases the waste of resources.’ ” Avery v. Steele, 414 Mass. 450, 456 (1993), quoting Romala Corp. v. United States, 927 F.2d 1219, 1224 (Fed. Cir 1991), quoting Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1578 (Fed.Cir. 1991). The court in Hough’s Case, 82 Mass. App. Ct. 1121 (2012) (Memorandum and Order Pursuant to Rule 1:28), recognized that, “ [o]ften it is the attorney and not the client who is the perpetrator of wasted time and effort for both the opposing party *and the administrative and judicial decision makers.*” (Emphasis added.) In such circumstances, we think it is reasonable and within our discretion to assess against the responsible attorney, as part of the “whole cost of the proceedings,” costs incurred by the Department in processing and deciding what is essentially a frivolous appeal. Accordingly, we order Ellis to pay to the Department the sum of \$2,500 to reimburse this Board for the time and expense of processing this unreasonable appeal.⁸ See Olsen v. Harbison, 134 Cal. App. 4th 278 (2005)(court orders offending party “to reimburse this court for the time and expense of processing the frivolous appeal”).

Finally, we have reviewed Buckley’s submissions, and find that, using the principle of *quantum meruit*, i.e., the reasonable value of legal services rendered, see Keegan v. August A. Busch & Co., 18 Mass. Workers’ Comp. Rep. 27, 31-32 (2004), he incurred \$5,118.86, in fees and costs in defending Ellis’ appeal to the reviewing board.⁹

⁸ Because the Board does not maintain a record of the number of hours spent on an appeal, this amount is a conservative estimate of the cost of three administrative law judges reviewing, researching and writing the prior decision, as well as the cost of administrative staff in processing the appeal, preparing documents for the reviewing board panel, and issuing the decision.

⁹ This amount represents 14.5 hours Buckley spent pursuing the appeal to the reviewing board at a rate of \$350.00 per hour, or \$5,075.00, plus costs of \$43.86. We reject Buckley’s claim for

We acknowledge that there is precedent for excluding attorney's fees from "the whole cost of the proceedings" in § 14(1). In Wheeler v. Yellow Freight Systems, Inc., 17 Mass. Workers' Comp. Rep. 194, 201 (2003), we stated, without discussion, that § 14(1) does not include attorney's fees. Cf. § 14(2) (which provides for "whole costs of such proceedings and attorneys' fees" as well as "a penalty payable to the aggrieved insurer or employee, in an amount not less than the average weekly wage in the commonwealth multiplied by six"). Wheeler has only been cited twice with reference to § 14(1), and in neither instance did we address the issue of inclusion of attorney's fees in that section. See Murphy v. Star Contractors, Inc., 17 Mass. Workers' Comp. Rep. 653, 658 (2003); Young v. Evans Delivery, 23 Mass. Workers' Comp. Rep. 391, 406 (2009).

More recently we have affirmed or ordered attorney's fees as part of "the whole cost of the proceedings" under § 14(1), and, where the decision was appealed, those awards have been affirmed by the Appeals Court. See, e.g., Saini v. Jeffco Fibers, Inc., 30 Mass. Workers' Comp. Rep. 335 (2016); Richards v. US Bancorp, 28 Mass. Workers' Comp. Rep. 115, 122 (2014); Packard v. Swix Sport USA, Inc., 23 Mass. Workers' Comp. Rep. 5 (2009), aff'd Packard's Case, 76 Mass. App. Ct. 1115 (2010) (Memorandum and Order Pursuant to Rule 1:28); Ferreira v. Forrest Homes of Massachusetts, 22 Mass. Workers' Comp. Rep. 203 (2008), aff'd Ferreira's Case, 75 Mass. App. Ct. 1101 (2009) (Memorandum and Order Pursuant to Rule 1:28); Cotter v. Hawkeye Constr. Co., 22 Mass. Workers' Comp. Rep. 213 (2008).

Moreover, in Santelli's Case, 90 Mass. App. Ct. 1112 (2016) (Memorandum and Order Pursuant to Rule 1:28), which involved a dispute between two attorneys, as here, the court affirmed an award of "the whole cost of the proceeding, *including the legal expenses and fees*," (emphasis added), incurred by the opposing attorney pursuant to § 14(1). We thus interpret "the whole cost of the proceedings" in § 14(1) to include legal expenses and fees measured on a *quantum meruit* basis, without reference to the amount

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of the § 13A statutory fees. Nothing in the Appeals Court’s decision in Evangelista’s Case, supra, remanding the matter to the Department, can be read to the contrary.

Accordingly, pursuant to § 14(1), we assess, and Ellis shall pay, \$5,118.86 to Buckley, and \$2,500.00 to the Department, as the “whole cost of the proceedings” on appeal before the reviewing board.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

William C. Harpin
Administrative Law Judge

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