

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 043462-98

Charles Rancourt
AC and S, Inc.
Reliance National Indemnity Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION (Judges Carroll, Levine and McCarthy)

APPEARANCES

Michael A. Rudman, Esq., for the employee
Linda C. Scarano, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on brief

CARROLL, J. The insurer appeals the decision of an administrative judge in which the employee's claim for an increase in benefits, from § 35 partial incapacity to § 34 total incapacity, and for payment of right shoulder surgery, was denied and dismissed after hearing on the merits. The insurer argues that the employee failed to perfect his appeal and that the claim should have been denied and dismissed without consideration of the merits by the judge. We agree and affirm the judge's decision to the extent that the employee's claim was denied and dismissed and we consider the decision on the merits a nullity.

We briefly set forth the procedural facts of this case. This is an accepted case for a work injury sustained on November 3, 1998. The insurer paid § 34 temporary total incapacity benefits without prejudice from November 3, 1998 to February 25, 1999 and maximum § 35 temporary partial incapacity benefits on a continuing basis thereafter. (Dec. 1.) The employee filed a claim for additional § 34 benefits and for the payment of surgery for the right shoulder. The matter was conferenced before an administrative judge pursuant to § 10A. (Dec. 1-2.) A prospective order of payment of § 34 benefits from the date of surgery forward was appealed by both parties. (Dec. 2.)

The insurer perfected its appeal by paying the required appeal fee. The employee, however, failed to comply with § 11A(2),¹ *id.*, thereby failing to perfect his appeal. On April 18, 2000, the insurer withdrew its appeal, (Dec. 2), thereby leaving nothing before the administrative judge for hearing. Notwithstanding, the administrative judge held a de novo hearing addressing the merits of the employee's claim for increased and further benefits. This was error.

The employee's failure to pay the § 11A fee or, in the alternative, to seek a waiver of the fee resulted in an unperfected appeal. Kowalczyk v. Morgan Constr. Co., 13 Mass. Workers' Comp. Rep. 284, 285 (1999). Once the insurer withdrew its appeal, the employee's claim should have been denied and dismissed without findings on the underlying merits of the claim. Here, the judge erroneously permitted the matter to proceed to hearing on the merits. (Dec. 2.) The final product of this futile exercise was the denial and dismissal of the employee's claim. We affirm the dismissal based on the failure of the employee to perfect his appeal. So much of the administrative judge's decision as addresses the merits of the claim is a nullity and is vacated. As indicated by the administrative judge, the employee is free to file a further claim for benefits. Aguiar v. Gordon Aluminum Vinyl, 9 Mass. Workers' Comp. Rep. 103 (1995). We note also that the insurer is paying § 35 benefits on a continuing basis. (Dec. 1.) In the absence of a hearing decision addressing the merits of a claim for increased and further benefits, the reviewing board's decision does not alter continuance of § 35 benefits.

¹ General Laws c. 152, § 11A(2), states in pertinent part:

When any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order pursuant to section 10A, . . . [t]he insurer or any claimant represented by counsel who files such appeal shall also submit a fee equal to the average weekly wage in the commonwealth at the time of the appeal to defray the cost of the medical examination under this section within ten days of filing said appeal; . . . where more than one party appeals, the fee shall be divided equally among all appealing parties

But see Neff v. Commissioner of Dept. of Indus. Accidents, 421 Mass. 70 (1995), and 452 Code Mass. Regs. § 1.11 (1)(a) (authorizing a claimant to petition for waiver of fees due to indigence).

Charles Rancourt
Board No. 043462-98

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: **April 17, 2002**
MC/jdm

William A. McCarthy
Administrative Law Judge