

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 038442-93

Cheryl Billert
Rainbow Nursing Home
Liberty Mutual Ins. Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Horan, McCarthy and Costigan)

APPEARANCES
Dana Johnson, Esq., for the third party
Joseph J. Durant, Esq., for the insurer

HORAN, J. This case is before us, again,¹ on the insurer's appeal² of an administrative judge's decision finding Steven Galena, D.C., liable for penalties under § 14(2)³ of our workers' compensation act.

¹ See Billert v. Rainbow Nursing Home, 13 Mass. Workers' Comp. Rep. 360 (1999).

² Initially, counsel for the third party filed a timely appeal. However, we dismissed that appeal in a memorandum of disposition filed on April 20, 2004, as counsel failed to file a brief within the time specified by 452 Code Mass. Regs. §1.15 (4)(g). He also failed to file a reply brief to the insurer's brief, which it had filed in support of its cross appeal.

³ General Laws c. 152, § 14(2), provides, in pertinent part:

If it is determined in any proceeding within the division of dispute resolution, a party, including an...expert medical witness acting on behalf of an employee...concealed or knowingly failed to disclose that which is required by law to be revealed, knowingly used perjured testimony or false evidence, knowingly made a false statement of fact or law, participated in the creation or preservation of evidence which he knows to be false, or otherwise engaged in conduct that such party knew to be illegal or fraudulent, the party's conduct shall be reported to the general counsel of the insurance fraud bureau. Notwithstanding any action the insurance fraud bureau may take, the party shall be assessed, in addition to the whole costs of such proceedings and attorneys' fees, a penalty payable to the aggrieved insurer...in an amount not less than the average weekly wage in the commonwealth multiplied by six.

The administrative judge found that Dr. Galena “[k]nowingly made a false statement in a proceeding within the Division of Dispute Resolution” relative to the employee’s medical history. (Dec. 6.) She assessed and ordered Mr. Galena to pay “the whole cost of the conference⁴ proceeding of June 7, 1994, and the insurer’s reasonable attorney’s fee for that conference.” (Dec. 7.) She also required him to pay the insurer a penalty in an amount equal to six times the average weekly wage in the commonwealth. Id. However, she made no findings regarding the amount of costs and attorney’s fees due. Id. Instead, she invited the parties to “request a hearing for the purpose of determining same,” if they could not reach an agreement. Id.

No agreement was reached. Rather than request a further hearing before the judge, the insurer appealed her decision. It asks us to “confirm” the assessed penalty equal to six times the average weekly wage in the commonwealth,⁵ to determine the attorney’s fees due, and to ascertain the cost of the conference proceeding. (Insurer br. 6.) We affirm the penalty, but lack the power to make findings on the remaining issues. See G. L. c. 152, § 11(C); Kelley v. General Elec. Co., 12 Mass. Workers' Comp. Rep. 476, 478 (1998). These tasks are left to the administrative judge. See G. L. c. 152, §§10A, 11 and 11(B). Accordingly, we affirm the award of a penalty equal to six times the average weekly wage in the commonwealth, and recommit the case for further proceedings⁶ to determine the

⁴ We note the judge did not assess costs or attorney’s fees for the hearing in this matter, only for the conference. As neither party raised this issue on appeal, we do not address it. See 452 Code Mass. Regs. § 1.15(4)(a)3.

⁵ Counsel for the insurer accurately calculated the penalty to be \$5,295.42, utilizing the average weekly wage in the commonwealth in effect on the filing date of the judge’s decision. Generally, it is this agency’s practice to utilize the conference and decision filing dates when determining the precise penalty due, as the statute and regulations provide no guidance on this issue.

⁶ This matter must be sent to another administrative judge, as the judge who issued the decision no longer serves with the department.

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whole cost of the conference proceeding, and the amount of reasonable attorney's fees due.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: December 29, 2004