COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. : 066739-92**

Cynthia Maxwell	Employee
North Berkshire Mental Health	Employer
Wausau Insurance Co.	Insurer
James N. Ellis & Associates	Third Party Claimant

REVIEWING BOARD DECISION
(Judges Levine, Wilson, and Carroll)

APPEARANCES
Michelle Manners, Esq., for the employee
Michael Palmieri, Esq., for the claimant
Patricia Vachereau, Esq., for the insurer

LEVINE, J. The third party claimant is an attorney who had represented the employee in her workers' compensation case. After the employee secured a new attorney, the third party claimant filed a lien pursuant to G. L. c. 221, § 50. He now appeals an administrative judge's decision denying his complaint to determine and enforce the attorney's lien following the approval of a lump sum agreement. The judge found that, under § 50, the attorney's remedy was in Superior Court. While we do not agree with the judge's reasoning, we affirm the decision for different reasons.

On or about August 2, 1994, the law firm of Ellis & Ellis filed a claim for compensation on behalf of the employee for an injury date of September 26, 1992. (Employee's Claim, dated August 2,1994.)[1] On December 22, 1994, an administrative judge issued a conference order awarding the employee a closed period of § 34 benefits from March 21, 1994 until May 8, 1994, and awarding the third party claimant an

[1] Because the decision recites only the barest procedural history, we look to the board file to fill in the gaps. See Peterson v. Edward J. Vella, Jr., 15 Mass. Workers' Comp. Rep. 298, 299 n.2 (2001). Hereafter, where the board file is the source for citation, reference will be to the specific document or to the "Board File."

attorney's fee and expenses. (Dec. 1, 2; Board File.) Both parties appealed to a hearing de novo, but both withdrew their appeals on April 13, 1995. (Board File.) On or about December 6, 1995, claimant counsel filed a claim for §§ 13 and 30 medical benefits on behalf of the employee. Id. Claimant counsel continued to represent the employee until March of 1996, when she obtained successor counsel. (Notice of Change/Appearance of Counsel, received by DIA March 25, 1996.)[2] On March 18, 1996, the now former counsel filed a notice of lien for expenses and undetermined fees pursuant to G. L. c. 221, § 50. (Dec. 2.) On March 25, 1998, the employee settled her case by way of a lump sum agreement. Id. A $3,500.00 attorney's fee, plus expenses, was ordered paid to successor counsel. Expenses of $256.00 were ordered paid to claimant counsel, the amount listed on his lien for expenses. (Dec. 2; Agreement for Redeeming Liability by Lump Sum Settlement, dated March 25, 1998 and approved on March 30, 1998.) On or about October 19, 1999, claimant attorney filed a third party claim for legal services, seeking an unspecified amount in attorney's fees pursuant to § 13A. (Third Party Claim/Notice of Lien, dated October 19, 1999.) The claim was denied at conference, and the attorney appealed to a de novo hearing. (Dec. 2; Board File.) The judge denied the insurer's motion to join the employee's successor counsel as a necessary party. (Board File.) The judge apparently took no testimony at hearing.

In his hearing decision, the judge took judicial notice of the December 22, 1994 conference which awarded attorney's fees and expenses to claimant; the third party lien filed March 18, 1996; and the lump sum agreement dated March 25, 1998.[3] (Dec. 1.) The attorney's lien was filed pursuant to G. L. c. 221, § 50, which provides:

> *From the* authorized commencement of an action, counterclaim or other proceeding in any court, or *appearance in any proceeding before any state* or federal department, *board* or commission, the attorney who appears for a client in

[2] The administrative judge states that claimant served as employee's attorney through a conference held in 1994. (Dec. 2.) The records cited above indicate that claimant remained employee's attorney until replaced in March of 1996.

[3] The decision indicates that the lump sum was dated March 25, 1991, (Dec. 1), but that date appears to be a scrivener's error. (See Dec. 2, listing correct 1998 date.)

> such a proceeding shall have a lien for his reasonable fees and expenses upon his client's cause of action, counterclaim or claim, upon the judgment, decree or other order in his client's favor entered or made in such proceeding, and upon the proceeds derived therefrom. Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien*; provided, that the provisions of this sentence shall not apply to any case where the method of determination of attorneys' fees is otherwise expressly provided by statute*.

(Emphasis added.)

The judge denied the third party claimant's claim for several reasons. First, he reasoned that, although the statute mentions that a fee might be due in state boards, the statute refers only to the courts as providing a remedy for the lien. Second, the judge noted that, although the last clause of the statute provides an exception to the jurisdiction of the courts in cases where the method of determination of attorney's fees is expressly provided by statute, "the basis for which Ellis now asks for a lien on fees is not one expressly determined by Section 13A." (Dec. 3.) Finally, the judge also noted that claimant was paid for his representation through conference. Id.

There are two basic issues raised by the appeal. The first is whether G. L. c. 221, § 50, applies to proceedings in the Department of Industrial Accidents. If it does, the second issue is whether the industrial accident board or the Superior Court has jurisdiction to determine and/or enforce the lien.

The applicability of G. L. c. 221, § 50, to workers' compensation cases has not been decided. See Ramalhete v. Uni-Royal, Inc., 4 Mass. App. Ct. 597, 599 (1976). See also L. Locke, Workmen's Compensation, § 634 (2d ed. 1981). However, the sweep of § 50 is broad, encompassing "any state . . . department, board or commission." We see no reason why this should not include the industrial accident board. See Locke, supra at § 634. See also G. L. c. 23E, §§ 4 and 5, establishing an industrial accident board and an industrial accident reviewing board within the division of dispute resolution. No authority has come to our attention that would exempt the department from the plain meaning of G. L.

c. 221, § 50.[4]

The first sentence of c. 221, § 50, gives an attorney the specific right to assert a lien for his fees. The second sentence addresses where that lien may be determined and enforced. The language of the statute does not support the judge's interpretation that the statute only provides for a remedy in the courts since it does not mention state boards in the second sentence. But the second sentence is clear that where the method for determining fees is expressly provided by statute, the previous provision giving jurisdiction to the courts is inapplicable: "[I]f the proceeding is not pending in a court, the superior court may determine and enforce the lien; provided, that the provisions of this sentence shall not apply to any case where the method of determination of attorneys' fees is otherwise expressly provided by statute." Id.

Section 13A of chapter 152 expressly provides for determination of attorney's fees. Section 13A governs when an attorney's fee is due and its amount at all stages of the dispute resolution process. Department judges are authorized to increase or decrease attorney's fees "based on the complexity of the dispute or the effort expended by the attorney." G. L. c.152, §§ 13A(5) and (6). Section 13A(8), which deals with fees in lump sum agreements, provides that the fee shall be paid from the settlement, and sets a maximum fee of fifteen percent for cases settled prior to establishment of liability and twenty percent for cases settled with liability. The parties have a right, under c. 152, §

[4] We reject the insurer's contention that because c. 152, § 46A, authorizes the filing of liens by accident and health insurance providers, the department of transitional assistance, and the division of medical assistance, but not by attorneys, no attorney's lien is allowed under c. 152. The mere fact that § 46A authorizes certain liens does not preclude an attorney's lien pursuant to c. 221, § 50. As Locke points out, the "sweep of [c. 221, § 50] is unlimited applying to any 'state. . . board or commission.' " Locke, supra at § 634.

We also reject the insurer's contention that c. 221, § 50, does not give the claimant a right to assert a lien in this case because there is no "proceeding" before the board. This argument overlooks the fact that the third party claimant had filed a claim on behalf of the employee for §§ 13 and 30 medical benefits in December 1995, subsequent to the withdrawal of the appeals of the conference order. This claim was still pending when successor counsel replaced prior counsel in March 1996. Therefore, the claimant had made an "appearance in [a] proceeding before [the] . . . board," as required for the assertion of a lien under G. L. c. 221, § 50.

48, to request that a lump sum agreement be approved by an administrative judge or administrative law judge as in the claimant's best interest. Therefore, we hold that § 13A expressly provides for the method of determining attorney's fees. That being the case, under the last clause of c. 221, § 50, the determination of an attorney's fee rests with the industrial accident board.

In addition, rule 1.19(1) of the regulations pertaining to the workers' compensation statute provides that, "When the employee's attorney and the insurer are unable to agree [on a fee and expenses], the administrative judge or Reviewing Board to whom the case was assigned shall determine the appropriate fee pursuant to M.G.L. c. 152, § 13A." 452 Code Mass. Regs. § 1.19(1). Regulations are to be afforded the same deference as statutes, Simcik v. MBTA, 13 Mass. Workers' Comp. Rep. 31, 36 (1999), as long as they are not " 'contrary to the plain and unambiguous terms of the legislative provision.' " Harney v. Goretti's Supermarket, Inc., 12 Mass. Workers' Comp. Rep. 157, 161 (1998), quoting Victoria, Inc. v. Alcoholic Beverage Control Comm'n, 33 Mass. App. Ct. 506, 512 (1992). Given the entirely self-contained system for determining attorney's fees in chapter 152, this regulation is consistent with the workers' compensation statute.[5]

There are alternatives for determining an attorney's fee when a lien is filed. "In the event of a dispute [with a prior attorney who has filed an attorney's lien], the matter can be addressed before an administrative judge or reviewing board at the time of the

[5] Prior to the enactment of § 13A in 1985, attorney's fees were "subject to approval of the division" under § 13, which also provided that in the case of disagreement regarding the amount of the fees, either party may notify the division, which would then schedule the matter for a conference. Locke wrote, "if there is disagreement over the fee [in a lump sum agreement] either between the attorney and the employee, or between two or more attorneys who may have represented the employee at different stages of the case, the matter must be determined in accordance with the procedure established by § 13." Locke, supra at § 633. Under the old § 13, the Supreme Judicial Court held that the board had the "authority in the administration of the statute to pass upon the entire subject [of attorneys' fees], and to do complete justice between the parties." Gritta's Case, 241 Mass. 525, 530 (1922).

lump sum presentation under rule 1.19(1), . . . provided all interested parties are given notice and an opportunity to be heard." Locke, supra at § 11.5 (Nason & Wall Supp. 1995).

Or an attorney can file a complaint for attorney's fees pursuant to § 10 of c. 152. Section 10(1) reads, in relevant part: "Unless otherwise expressly provided, on the receipt of . . . a complaint from any party requesting resolution of *any other issue arising under this chapter*, the division of administration shall notify the parties that it is in receipt of such claim or complaint." (Emphasis added.) Cf. Murphy's Case, 53 Mass. App. Ct. 424, 430 (2001), citing Brown v. Highland House Apartments, 12 Mass. Workers' Comp. Rep. 322, 324, 325, n.6 (1998)(§ 10 provides a basis for bringing certain claims for recoupment). Locke, supra at § 11.5 (Nason & Wall Supp.)("If an attorney desires a proceeding concerning an attorney's fee dispute, Form 115 [entitled 'Third Party Claim/Notice of Lien'] should be filed").[6]

While we conclude that c. 221, § 50, gives an attorney the right to assert a lien, and, when read in conjunction with c. 152, § 13A, gives jurisdiction to the board to determine its amount, there is no jurisdiction to do so in the present case. This is because the lump sum ordering all the attorney's fees to subsequent counsel was approved by a department judge. Once approved, it has the same status as other approved agreements at the board.[7] Such agreements cannot be reformed by the board. See, e.g., Hansen's Case,

---

[6] We are aware that actions as to a lien under § 50 can involve matters of both law (questions as to whether a lien exists and, if so, for how much) and equity (questions as to enforcement of an established lien). Elbaum v. Sullivan, 344 Mass. 662, 664 (1962). Torphy v. Reder, 357 Mass. 153, 153-154 (1976). There is no enforcement mechanism at the board. G. L. c. 152, § 12(1). Assuncao's Case, 372 Mass. 6, 10(1977).

[7] General Laws c. 152, § 19, provides, in pertinent part:

> [A]ny payment of compensation shall be by written agreement by the parties and subject to the approval of the department. Any other questions arising under this chapter may be so settled by agreement. Said agreement shall for all purposes be enforceable in the same manner as an order under section twelve.
>
> . . .

350 Mass. 178, 180 (1966)("once approval [of an agreement] is granted by the division [the Act] precludes further inquiry into the merits of the original controversy except by the Superior Court for fraud or mistake"); West's Case, 313 Mass. 146, 153 (1943)("When an agreement for compensation has been made and approved . . . , then all further inquiry into the merits of the original claim both as to liability and the amount of compensation for the period covered are, in the absence of fraud, accident or mistake, conclusively settled"); Virta's Case, 287 Mass. 602, 605 (1934)("When the instrument of the finality of a memorandum of agreement has been approved by the board and has been acted upon, it has passed beyond the control of the board so far as concerns inquiry as to its validity"); O'Reilly's Case, 258 Mass. 205, 209 (1927)("After an agreement has been approved by the department, and acted upon, any party in interest may and should present that agreement to the Superior Court for a decree of reformation or cancellation, if such a decree would be justified on the facts had the agreement been made in a suit heard and determined in that Court").

We therefore affirm the judge's decision insofar as it held that he had no authority to determine claimant's lien. The claimant's remedy, if any, is in Superior Court for the reformation of the lump sum agreement and, in the event that a fee is determined to be due, for enforcement of any judgment. See Locke, supra at § 634, cited in Ramalhete v. Uni-Royal, Inc., supra at 599.

So ordered.

_____
Frederick E. Levine
Administrative Law Judge

> [T]he Department shall approve any agreement received on a prescribed form unless such agreement is deemed to be in violation of law. Any agreement not approved shall be returned to the party submitting it. Except as provided by section ten B, a party to any agreement under this chapter may file a complaint with the superior court to vacate or modify such agreement on grounds of law or equity.

A § 48 lump sum agreement is, by definition, "an agreement pursuant to section nineteen."

_____
Sara Holmes Wilson
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

FEL/cas
Filed: March 12, 2002