COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	BOARD NO. 031303-04
David Leveille	Employee
James N. Ellis, Esq.	Third Party Claimant
Munters Corp.	Employer
St. Paul Travelers Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Bean.

APPEARANCES
Rickie T. Weiner, Esq., for the third party claimant at hearing
James N. Ellis, Esq., for the employee, and pro se, on appeal[1]
John J. Canniff, Esq., for the insurer

HORAN, J. This case comes to us on cross appeals. Both parties maintain the judge erred by failing to assess costs and penalties pursuant to G. L. c. 152, § 14.[2] We affirm the decision.

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[1] The third party claimant, who also continues to represent the employee, filed the instant third party claim for § 13A(5) attorneys fees and costs stemming from his representation of the employee at a prior hearing. (Employee br. 2.) The insurer filed a motion to dismiss the claim, but it was denied by the judge, in part because the judge found the appeal of the underlying conference order, filed by the claimant on behalf of the *employee*, was sufficient to preserve the § 13A(5) issue for hearing. (Tr. I, 8.) On appeal, the insurer does not challenge the judge's denial of its motion to dismiss, nor does it raise any issue respecting the judge's authority to decide the attorney's fee issue.

[2] The employee's brief merely refers to the judge's failure to assess penalties under "§ 14," and does not designate any particular subsection of the statute. The insurer argues the judge erred in failing to assess penalties pursuant to G. L. c. 152, §§ 14(2) and (3); these sections provide, in pertinent part:

> (2) If it is determined that in any proceeding within the division of dispute resolution, a party, including an attorney . . . 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 presentation of evidence which he knows to be false, or otherwise engaged in conduct that such party

This matter was heard on September 19, 2008,[3] following the approval of a § 19[4] agreement reached by the parties at a prior scheduled hearing.[5] (Dec. 718-719.) That agreement resolved claims advanced by the employee under §§ 34, 8 and 14(1), and the insurer's complaint to discontinue or modify the employee's benefits. (Dec. 717-719; Tr. II. 33, 92.) However, the § 19 agreement did not address the subject of the employee's entitlement to attorney's fees. (Dec. 719.) Accordingly, the claimant filed a claim for fees pursuant to § 13A(5),[6] and "reserved section 14." (Employee Hearing

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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 or employee, in an amount not less than the average weekly wage in the commonwealth multiplied by six.

(3) Notwithstanding any provision of section one hundred and eleven A of chapter two hundred and sixty-six to the contrary, any person who knowingly makes any false or misleading statement, representation or submission or knowingly assists, abets, solicits or conspires in the making of any false or misleading statement, representation or submission, or knowingly conceals or fails to disclose knowledge of the occurrence of any event affecting the payment, coverage or other benefit for the purpose of obtaining or denying any payment, coverage, or other benefit under this chapter . . . shall be punished by imprisonment in the state prison for not more than five years or by imprisonment in jail for not less than six months nor more than two and one-half years or by a fine of not less than one thousand nor more than ten thousand dollars, or by both such fine and imprisonment.

[3] The hearing took place on September 19, 2008 and November 10, 2008; we refer to the transcript of each day as Tr. I, and Tr. II, respectively.

[4] General Laws c. 152, § 19(1), provides:

> Except as otherwise provided by section seven, any 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 agreements shall for all purposes be enforceable in the same manner as an order under section twelve.

[5] The date of that hearing was September 26, 2006; the aforesaid § 19 agreement was approved by the judge on January 2, 2007. (Dec. 719.)

[6] General Laws c. 152, § 13A(5), provides, in pertinent part:

> Whenever an insurer files a complaint or contests a claim for benefits and then

Memorandum, 9/19/08.) The insurer denied the claimant was entitled to an attorney's fee under § 13A(5), and raised the defenses of "§ 14(2), § 14(3), Estoppel, waiver, [and] unclean hands."[7] (Ins. Hearing Memorandum, 9/19/08.) At the September 19, 2008 hearing, claimant's counsel stated: "The only thing here that we are claiming is the hearing fee." (Tr. I, 14.)

In his decision, the judge determined that because the § 19 agreement was reached on the day of the prior hearing, § 13A(5)(i) applied. (Dec. 721; see footnote 5, supra.) He related his understanding of the customary practice, when dealing with a "late settling case," was that the parties usually compromised on the amount of the attorney's fee due. (Dec. 721.) Realizing the parties were unable to reach an agreement on the amount of the fee due, the judge found that "an equitable and fair attorney's fee in this case is $6,000."[8] (Dec. 725.)

On appeal, the insurer argues the claimant violated §§ 14(2) and (3) by failing to promptly inform it that the employee had returned to work several months prior to the September 2006 hearing.[9] The insurer maintains the claimant "manipulated the process," and set a "five day trap" to cause the insurer to pay an attorney's fee it may

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> either (i) accepts the employee's claim or withdraws its own complaint within five days of the date set for a hearing pursuant to section eleven . . . the insurer shall pay a fee to the employee's attorney in an amount equal to three thousand five hundred 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.

[7] The judge stated the insurer advanced no argument at hearing in support of its "waiver" and "estoppel" defenses. (Dec. 721.) On appeal, the insurer claims error with respect to the issues of §§ 14(2) and (3) only.

[8] On appeal, neither the insurer, nor the claimant, raises any issue respecting the amount of the attorney's fee awarded.

[9] It appears that the employee returned to work in early 2006. The claimant testified he did not know his client had returned to work until that summer, and that he notified insurer's counsel of this fact in a letter dated August 22, 2006. (Dec. 722; Tr. II, 56-58.) The employee, after his return to work, did not cash the checks he received from the insurer; the claimant advised the employee to bring the uncashed checks to the September 26, 2006 hearing. (Dec. 718; Tr. II, 69-70.)

have avoided by voluntarily adjusting the case earlier. (Ins. br., 14-15.) The claimant's behavior, according to the insurer, "warrants the imposition of sanctions pursuant to section 14(3)." (Ins. br. 11-12.) The insurer also avers the claimant violated § 14(2) because he had "an obligation to disclose" to it that his client had returned to work. (Ins. br. 14.) The claimant maintains the judge erred by failing to penalize the insurer, pursuant to § 14, for its failure to pay an attorney's fee voluntarily, given the applicability of § 13A(5)(i). (Employee br. 5-6.) We address these issues in turn.

Respecting the insurer's assertion that the claimant violated § 14(3), we conclude the judge lacked jurisdiction to entertain its claim. The statutory language of § 14(3) mirrors that of § 14(2). See footnote 1, supra. But unlike § 14(2), § 14(3) provides for criminal penalties. Nothing in our workers' compensation act empowers administrative judges to hold criminal trials. It is therefore left to the Commonwealth to decide whether there is cause to prosecute an action under that subsection of the statute.[10]

We also conclude, based on the arguments advanced by the insurer, the judge did not err as a matter of law by finding that the claimant did not violate § 14(2). That section authorizes the judge to assess costs, attorney's fees, and a penalty "in an amount not less than the average weekly wage in the commonwealth multiplied by six" against a party who, "in any proceeding within the division of dispute resolution," has:

> 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 presentation of evidence which he knows to be false, or otherwise [has] engaged in conduct that such party kn[ows] to be illegal or fraudulent.

[10] We note the final paragraph of § 14(3) provides: "[t]he court shall, after conviction, conduct an evidentiary hearing to ascertain the extent of the damages or financial loss suffered as a result of the defendant's crime," and further provides for additional penalties for persons "found guilty of violating this section."

General Laws c. 152, § 14(2). The insurer fails to cite any authority in support of its argument that the claimant was "required by law" to contact them upon learning that his client had returned to work.[11] Even if such authority exists, it is clear from our examination of the record that the claimant's alleged improper conduct did not occur "in any proceeding within the division of dispute resolution." G. L. c. 152, § 14(2); Murphy's Case, 53 Mass. App. Ct. 708 (2002).[12] Accordingly, the judge did not err when he failed to find the claimant in violation of § 14(2).

Lastly, the claimant argues the judge erred by failing to assess § 14 penalties and costs against the insurer. We need not address this argument, as the claimant never raised § 14 at the September 19, 2008 hearing. In fact, when the judge reminded claimant's counsel that he had only "reserved" § 14, counsel replied: "Right." The judge then stated, "[u]ntil you assert [§] 14, I'm not going to worry about it." Claimant's counsel replied, "[o]kay." (Tr. I, 11-12.) Our review of the record reveals that following this exchange, claimant's counsel failed to raise § 14. Nevertheless, the judge found as a fact that "the insurer's actions in this case" did not fall "within the orbit" of § 14. (Dec. 726.) There was no error.

The decision is affirmed. Pursuant to § 13A(6), the employee's attorney is awarded a fee of $1,488.30.

So ordered.

Mark D. Horan
Administrative Law Judge

[11] The judge found that on August 11, 2006, the insurer sent the employee a § 11D "earnings report." He also found the report was received by the employee's attorney on September 1, 2006, and that "[i]t was filled out and returned on September 20th." (Dec. 717.)

[12] In its brief, the insurer makes no attempt to distinguish the facts in this case from the facts in Murphy, nor does it posit that the claimant's alleged illegal conduct occurred in a "proceeding within the division of dispute resolution." In fact, the briefs submitted by the parties fail to cite, much less discuss, the court's decision in Murphy. In light of the facts found by the judge, we consider Murphy to be dispositive of the insurer's § 14(2) claim.

Patricia A. Costigan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: