COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 033093-03**

Edgar Giraldo	Employee
Albert's Inc.	Employer
Employers Insurance Company of Wausau	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Levine)

The case was heard by Administrative Judge Novick.

APPEARANCES
Charles E. Berg, Esq., for the employee
Boaz N. Levin, Esq., for the insurer at hearing
Christopher N. Shumate, Esq., for the insurer on appeal

FABRICANT, J. The employee appeals from a decision dismissing his claim for § 36(1)(k) benefits[1] due to his failure to pay the appeal fee mandated by G. L. c. 152, § 11A(2).[2] We affirm.

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[1] General Laws c. 152, §36(1)(k), provides:

> For bodily disfigurement, an amount which, according to the determination of the member or reviewing board, is a proper and equitable compensation, not to exceed fifteen thousand dollars; which sum shall be payable in addition to all other sums due under this section. No amount shall be payable under this section for disfigurement that is purely scar-based, unless such disfigurement is on the face, neck or hands.

[2] General Laws c. 152, § 11A(2), provides, 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 ten A, the parties shall agree upon an impartial medical examiner from the roster to examine the employee and submit such choice to the administrative judge assigned to the case within ten calendar days of filing the appeal, or said administrative judge shall appoint such examiner from the roster. The 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. . . .

The employee first filed a claim pursuant to § 36 on December 21, 2005. (Dec. 5; Ins. Ex. 4.) A December 26, 2008 hearing decision denied all the employee's pending claims for benefits, creating an overpayment of $20,005.14. (Dec. 5; Ins. Ex. 2.)

Subsequent to this decision, the employee filed a new claim for § 36(1)(k) benefits, to which the insurer joined a claim for recoupment. (Ins. Ex. 4.) The Temporary Conference Memorandum (Form 140; Ex. 1) accompanying the parties' conference submissions indicated that both the employee and the insurer were in agreement that a medical examination pursuant to § 11A(2) would be required.[3] The conference order of May 5, 2009, denied the employee's claim and did not address recoupment. (Dec. 5; Ins. Ex. 5.)

The employee filed a timely appeal of the May 5, 2009 conference order, but never filed the requisite fee mandated by § 11A(2). (Dec. 6; Ex. 1.) More than a year later, the department issued a "§ 10A Conference No Fee Notice" to all parties, indicating that the employee's appeal was being administratively withdrawn due to his failure to file the required fee or otherwise take action within the prescribed time period. (Dec. 6; Ins. Ex. 7.)

Despite the employee's written objection to the department's notice, essentially asserting for the first time that the claim only concerned a "non-medical issue," the Senior Judge confirmed the administrative withdrawal on June 28, 2010, finding that, "the case does involve medical issues," and that a filing fee was required. (Dec. 7; Ins. Ex. 9.)

Rather than submit the required fee, the employee filed, over one year later, a second claim for § 36(1)(k) benefits on August 30, 2011; this claim was denied at a December 30, 2011, conference. (Dec. 7; Employee Exs. 5, 7; Ins. Exs. 10, 11.) This time, however, the § 10A conference order was appealed by the employee as a non-medical issue. (Dec. 7; Employee Ex. 8.)

[3] Neither party asserted a desire to "opt out" of the § 11A(2) requirement, and the judge made no further comment on this issue. (Dec. 5.)

Notwithstanding the employee's protestations, there is no need to address any of his proffered theories on appeal, as he clearly did not preserve his right to a hearing. The employee's failure to perfect the appeal of the initial conference order denying the § 36(1)(k) claim barred its re-litigation. General Laws c. 152, § 10A(3), provides, in relevant part:

> Any party aggrieved by an order of an administrative judge shall have fourteen days from the filing date of such order within which to file an appeal for a hearing pursuant to section eleven. . . .
>
> Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings. . . .

General Laws c. 152, § 10A(3), further provides a one year period within which a party may petition the commissioner (now, director) to perfect an appeal if the original deadline is not met due to "mistake, accident or other reasonable cause." See Gen. Laws c. 152, § 1(1A), as amended by An Act Reorganizing the Executive Office of Labor and Workforce Development, St. 2011, c. 3 § 152 (striking the words "commissioner of" and replacing them with "director of the department"). The judge found that the employee made no such request. (Dec. 8.)

We have previously addressed this issue in Ellingwood v. CLP Resources, Inc., 26 Mass. Workers' Comp. Rep. 89 (2012), and our analysis there still applies: Where the employee agreed, on the record, that an impartial medical examination was required, he waives his right to challenge, at hearing, the necessity of a medical exam to resolve his pending claim.

The decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

HORAN, J., (concurring). I agree that on the facts of this case, the employee's counsel's failure[4] to pay the fee required by § 11A(2), following the May 5, 2009 conference order denying the employee's § 36(1)(k) claim, transformed that order into a final adjudication, and denial, of his claim. G. L. c. 152, § 10A(3); See McGahee v. Milton Bradley, 25 Mass. Workers' Comp. Rep. 329 (2011), and cases cited; see also Cerasoli v. Hale Dev., 13 Mass. Workers' Comp. Rep. 267 (1999). Thus, the employee was not entitled to relitigate the issue of his entitlement to benefits under § 36(1)(k). (Dec. 9.) Because employee's counsel fails to articulate an argument[5] distinguishing the facts of this case from those of the aforementioned cases, I write separately to express my view that the employee's appeal to this board lacked "reasonable grounds. . . ." G. L. c. 152, § 14(1). As the Appeals Court recently stated,

> [W]e take this opportunity to observe that in the field of workers' compensation litigation, the attorney typically knows far better than the client when an appeal is frivolous. Often, 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. We repeat our warning that we will not hesitate to award attorney's fees and costs against counsel in appropriate cases. See Worcester v. AME Realty Corp., 77 Mass. App. Ct. 64, 72-74 (2010).

[4] It is certainly reasonable to assume that the employee relied upon his attorney to perfect the appeal of the May 5, 2009 conference order by paying the fee. Apparently, no attempt was made on the employee's behalf to exempt him from that requirement on indigency grounds. See 452 Code Mass. Regs. § 1.11(1)(a).

[5] Employee's counsel's reliance on Ellis v. Commissioner of the Dept. of Indus. Accidents, 61 Mass. App. Ct. 902 (2004), is entirely misplaced. In that case, it was undisputed that the appeals did not involve medical issues; accordingly, no § 11A(2) fees were required. Id. at 902-903. Here, the parties agreed at the first conference on the employee's § 36(1)(k) claim that an impartial examination was necessary. See Ellingwood, supra.

Hough's Case, 82 Mass. App. Ct. 1121 (2012) (Memorandum and Order Pursuant to Rule 1:28). Accordingly, I would assess "the whole cost" of this appeal against employee's counsel. G. L. c. 152, § 14(1).

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Mark D. Horan
Administrative Law Judge

Filed: **June 13, 2013**