COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** | **BOARD NOS. 029333-01 008905-08**

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| Gordon Holden | Employee |
| Town of Wilmington | Employer |
| MEGA Property & Casualty Group | Self Insurance Group |
| Town of Wilmington | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges Fabricant, Horan and Levine)

The case was heard by Administrative Judge Bean.

**APPEARANCES**
Daniel P. Napolitano, Esq., for the employee
John J. Canniff, III, Esq., for the self insurance group
Paul M. Moretti, Esq., for the self-insurer on appeal[1]

**FABRICANT, J.** The Town of Wilmington ("self-insurer")[2] appeals from a decision in which the administrative judge ordered that it pay the employee benefits for a 2001 injury. The judge had joined a claim for the 2001 injury to a pending claim for a 2008 injury for which the Massachusetts Education & Government Assn. Self-Insurance Group ("MEGA") was on the risk. We hold that the self-insurer was not properly notified of the joinder, and thus was denied its right to representation at the hearing. See 452 Code Mass.Regs. § 1.20.[3] This violation of due process requires that we vacate the

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[1] The Town of Wilmington was not represented at the hearing.

[2] Throughout these proceedings, prior to this appeal, the Town of Wilmington was identified only as "Employer," while the Massachusetts Education & Government Assn. Self-Insurance Group (MEGA) was identified as "Self-Insurer."

[3] 452 Code Mass. Regs. § 1.20(1) provides:

> An administrative judge before whom a proceeding is pending may join, or any party to such proceeding may request the administrative judge to join, as a party, on written notice and a right to be heard, an insurer, employer, or other person who may be liable for payment of compensation to the claimant.

decision and recommit the case for a hearing de novo before a different administrative judge.

The employee alleged he suffered an industrial injury to his back on August 8, 2001, for which he treated conservatively and was out of work for about one month. He then returned to full duty. From 2001 to 2008 the employee had episodes of pain, which he treated primarily with chiropractic care and pain medications. After September 2007, the employee's back pain became progressively worse. (Dec. 859.)

On February 22, 2008, the employee alleges that he injured his back while at work repairing a snow blower, although he did not report it. At that time, MEGA was on the risk for the employer, Town of Wilmington. The employer's first notice of this injury came in April 2008. While that claim was denied at the subsequent conference, the judge allowed the employee's motion to join a claim for his 2001 injury.[4] (Dec. 858.)

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[4] At the § 10A conference, the employee presented a motion to join the first date of injury, August 8, 2001. The only objections were those of Attorney John Canniff, representing MEGA (identified as "self-insurer" at that time). The motion was allowed. (Ruling on Motion for New Trial, 941.) No attorney actually representing the Town of Wilmington for the 2001 date of injury was present at either the § 10A conference or the subsequent hearing.

Before the first witness was called at the hearing, the Motion to Join was again raised in the following exchange:

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| Mr. Canniff: | Your Honor–excuse me, Mr. Napolitano–are we acting upon the premise that the motion to join at conference has been allowed and the claim has been amended? |
| The Judge: | Are you talking about the motion to join an alleged injury of August 8th, 2001? |
| Mr. Canniff: | Yes, Judge. |
| The Judge: | That is part of your claim; is that correct, Mr. Napolitano? |
| Mr. Napolitano: | I was under the impression it was allowed at conference. |
| The Judge: | All right. Then we have two dates of injury, 8/8/01 and 2/22/08. Two dates of injury. Neither accepted by the self-insurer.<br>All right, anything else? |
| Mr. Napolitano: | Thank you, Judge. |
| Mr. Canniff: | Please note my objection that's all. |
| The Judge: | So noted. |
| Mr. Napolitano: | Thank you, Your Honor. |

(Tr. 4-5.)

Ultimately, the judge did not credit the employee's account of the 2008 injury, and found that the 2001 injury remained a major contributing cause of his disability and need for treatment, ordering the self-insurer (Town of Wilmington) to pay the employee partial incapacity benefits. (Dec. 865-866.)

It is clear from the record that from the time of the allowance of the joinder, the case proceeded on the assumption that MEGA was on the risk for both the 2008 and 2001 claims. Only after the hearing was completed and the decision filed did the judge become aware that MEGA, the self insurance group, was not on the risk in 2001, and that the Town of Wilmington was a singular self-insurer at that time.[5] (Ruling on Motion for a New Trial, 943.) The self-insurer moved for a new trial, which the judge denied. The self-insurer appeals.

Although it is now undisputed that MEGA was not on the risk for the 2001 injury, this readily ascertainable fact eluded the judge for reasons which have become clear since the filing of his decision. The employee's attorney conceded at oral argument that, upon the initial presentation of the motion to join, he had presumed that MEGA was on the risk for the 2001 incident without properly confirming it with the Department of Industrial Accidents. Further compounding this error, MEGA's attorney voiced opposition to the motion to join, but did not inform the judge that MEGA did not insure the Town of Wilmington in 2001. In fact, MEGA's attorney has admitted to purposefully remaining silent on this issue, despite knowing all along that MEGA did not insure the Town of Wilmington in 2001. During oral argument, when questioned why he chose not to reveal

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[5] There is a distinct difference between a § 69 public employer as self-insurer under § 25A(2) – (3) – by way of § 70 (applying provisions of the act to § 69 public employers) – and a public employer's membership in a "[p]ublic employer workers' compensation self-insurance group" under §§ 25E through 25U. While a self-insured public employer is just what the words describe, a "public employer group" is defined as "a not-for-profit unincorporated association consisting of five or more employers, all of whom are public entities, who enter into agreements to pool their liabilities for workers' compensation benefits and employer's liability in this state." G. L. c. 152, § 25E. Therefore, the judge's assertion, that "[a] self-insurer is a self-insurer is a self-insurer," (Ruling on Motion for New Trial, 944), is erroneous.

this fact to the judge at hearing, MEGA's counsel indicated that this had been a deliberate "tactic" that was a part of his litigation strategy.

MEGA asserts that this action is mitigated because Mr. Jeffrey Hull, an employee and witness for the self-insurer, was in the hearing room at the time of the presentation of the motion to join. (MEGA br., 11-19.) We disagree. Mr. Hull is not an attorney and was not an employee that could reasonably be expected to represent the interests of the self-insured employer in any meaningful way regarding the determination of its legal obligations (or lack thereof) under these circumstances. See Wang v. Niakaros, 67 Mass. App. Ct. 166, 169-170 & n. 5 (2006)(mere attendance at hearing does not constitute appearance in proceeding; order reversed for failure to conform to requirements of due process). Further, there was nothing on the record indicating that the self-insurer would proceed *pro se* in its defense against liability for the employee's claim stemming from the 2001 injury. The self-insurer's fundamental right to notice of the claim against it, and the opportunity to prepare and defend that claim, were violated. See Haley's Case, 356 Mass. 678, 681 (1970); Meunier's Case, 319 Mass. 421, 426-427 (1946).

The erroneous joinder allowed the case to proceed against the self-insurer without notice of the claim, and without representation by counsel. The judge ultimately found the 2008 injury had not occurred, and dismissed the claim against MEGA. (Dec. 865-866.) However, the judge ordered the unrepresented self-insurer to pay the employee § 35 partial incapacity benefits, and the self-insurer continues to bear the burden of an ongoing obligation to pay benefits as a result of a hearing in which it did not participate.[6] This is unfair prejudice resulting from a clear due process violation. As a result, the entire matter must be relitigated with proper notice to, and participation of, all parties. Accordingly, we vacate the decision and recommit the case.[7]

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[6] In addition to attorney's fees, costs and medical expenses pursuant to §§ 13 and 30, the judge ordered the self-insurer to pay § 34 benefits at a rate of $569.18 from May 22, 2008 to July 16, 2008 and § 35 benefits at a rate of $404.18 from February 23, 2008 to May 21, 2008 and from July 17, 2008 to the present and continuing. (Dec. 867-868.)

[7] Because of our disposition of this appeal, it is unnecessary for us to address the other arguments raised. Kenney v. Commissioner of Correction, 393 Mass. 28, 35 n. 10 (1984).

Unfortunately, our procedural disposition of this appeal does not end our inquiry, as we are also compelled to consider whether the actions of MEGA's attorney violated G. L. c. 152, § 14(2). That section provides, in pertinent part:

> If it is determined in any proceeding within the division of dispute resolution, a party, including an attorney . . . acting on behalf of an employee or insurer, concealed or knowingly failed to disclose that which is required by law to be revealed, . . . 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. . . .[T]he party shall be assessed, in addition to the whole costs of such proceedings and attorney's fees, a penalty payable to the aggrieved insurer or employee. . . .

As noted, Attorney Canniff has acknowledged that his failure to notify the judge that MEGA did not insure the Town of Wilmington on the date of the joined earlier injury was a deliberate "litigation tactic."[8] This cannot, under these circumstances, be viewed, even charitably, as "zealous representation." See Matter of Angwafo, 453 Mass. 28, 35 (2009)("Silence can be tantamount to a false representation where there is a duty to speak"). To the contrary, Attorney Canniff's failure to inform the judge that he did not represent the self-insurer, and that his actual client, MEGA, was not on the risk in 2001, violates as many as four provisions of Supreme Judicial Court Rule 3:07, Massachusetts Rules of Professional Conduct (1998): Rule 8.4 (c)("professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 8.4(d)("professional misconduct for a lawyer to engage in conduct prejudicial to administration of justice"); Rule 4.3(a)("In dealing on behalf of a client with a person

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[8] Attorney Canniff apparently made a similar admission to the administrative judge at a post-hearing status conference:

> "At a status conference on September 9, 2009 I asked Attorney Canniff why he had made no attempt to notify employee's counsel or me of his belief that he did not represent the Town with regard to the 2001 injury. He stated that he was under no obligation to share that information."

(Ruling on Motion for a New Trial, 943.)

who is not represented by counsel . . . , when the lawyer knows or has reason to know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding"); and Rule 4.4 ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to . . . delay, or burden a third person . . . "). See Roy v. Rubin, 35 Mass. App. Ct. 633, 635-636 (1993)(lawyer, unassociated with estate, had duty to disclose to executor of estate his knowledge of existence of undiscovered asset belonging to estate; withholding such to gain advantage "was inimical to the administration of justice," suggesting violation of Disciplinary Rule 1-102[A][5] and warranting sanction of attorney's fee award). Finally, Attorney Canniff's purposeful concealment of the scope of his representation, in order to gain a tactical advantage in the litigation (namely, the elimination of a represented opponent in this successive insurer case), yielded a fraud on the court, by "unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989). "[A]n attorney [must] bring material facts to the attention of the court when ignorance by the court is likely to produce an erroneous decision and not just when his opponent is and will remain ignorant." Matter of Neitlich, 413 Mass. 416, 423 (1992), quoting Matter of Mahlowitz, 1 Mass. Att'y Discipline Rep. 189 (1979).

Attorney Canniff's actions lead us to conclude that he has violated G. L. c. 152 § 14(2), at least by "conceal[ing] or knowingly fail[ing] to disclose that which is required by law to be revealed,". . . and possibly "engag[ing] in conduct that [he] knew to be . . . fraudulent." In order to ascertain the amount of the "whole costs of the proceedings" to be assessed, counsel for the self-insurer and counsel for the employee shall submit to this panel, within twenty-one days of the filing of this decision, affidavits of fees and costs associated with all post-conference proceedings. Attorney Canniff will then have fourteen days from the date of receipt of said affidavits to challenge the amount of the asserted costs and fees. We retain jurisdiction of the case for the sole purpose of determining the amount due pursuant to § 14(2).

Attorney Canniff's conduct in this case demonstrates a profound misunderstanding of the law and our dispute resolution process. Deliberately concealing critical information regarding the applicable insurance coverage in this matter was not, as Attorney Canniff would have it, ". . . a simple misunderstanding, a little lack of attention to detail . . . [or] zealous representation." (MEGA br. 6.) By his own admission, his deceit was a premeditated "tactic" designed to influence the outcome of the case. Notwithstanding our determination of costs and fees due pursuant to G. L. c. 152 § 14(2), we are also obligated to assess a penalty in the amount of the average weekly wage in the commonwealth multiplied by six, payable by Attorney Canniff to the Town of Wilmington. We must also, pursuant to the statute, refer this matter to both the general counsel of the insurance fraud bureau and the board of bar overseers. Additionally, we are compelled to refer this matter to the senior judge of the department of industrial accidents, pursuant to G. L. c. 152, § 7C.

Finally, we are not sanguine that the self-insurer can get a fair hearing before the same judge on recommittal.[9] As such, we grant the self-insurer's motion for reassignment, and transfer the case to the senior judge for reassignment to a new administrative judge for a hearing de novo.

Accordingly, the decision is vacated. The case is forwarded to the senior judge for reassignment and a hearing de novo.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judg

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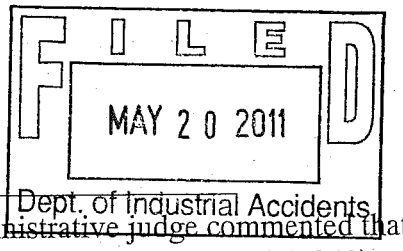


[9] The administrative judge commented that ". . . the outcome in a retrial is not likely to change." (Ruling on Motion for a New Trial, 943).