COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 037192-05

Israel Aponte	Employee
Home Depot	Employer
Home Depot USA, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Levine)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing and on brief
James N. Ellis, Esq., for the employee on appeal
Darren I. Goldberg, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

COSTIGAN, J. The employee challenges the administrative judge's award of § 14 penalties and the order of recoupment against him. Although the decision is not free of errors, they are either harmless or waived. We affirm.

On November 7, 2005, the employee suffered an injury to his low back while lifting bags of cement at work. The self-insurer accepted liability and paid the employee § 34 total incapacity benefits and medical benefits. On July 24, 2007, the self-insurer filed a complaint to discontinue § 34 benefits based on a medical report. (Dec. 1.) Unbeknownst to the self-insurer at that time, the employee had returned to work for a different employer, Panera Bread; while continuing to collect total incapacity benefits, he worked for Panera from January 16, 2007 to sometime in May 2007, and again from the end of August 2007 until sometime in November 2007. (Dec. 9.)

On October 2, 2007, prior to conference, the self-insurer discontinued payments unilaterally when the employee twice failed to report to a § 45 medical

examination.[1] The employee then filed a claim alleging illegal discontinuance under § 8. Upon learning the employee continued to accept payment of § 34 benefits while gainfully employed, the self-insurer joined a complaint for § 14 fraud penalties and recoupment. (Dec. 1-2.)

By § 10A conference order filed on December 3, 2007, the administrative judge awarded the self-insurer the penalties and recoupment sought, without identifying a sum certain for either.[2] He authorized the self-insurer to "discontinue all benefits to the employee," and ordered that the employee forfeit all benefits during the period of suspension from October 3, 2007 through November 30, 2007. The judge also referred the matter to the insurance fraud bureau for investigation. The parties cross-appealed from the order. (Dec. 1-2.) The self-insurer characterized its appeal as involving a "Non-Medical Issue," and did not pay the appeal fee which underwrites the cost of the § 11A impartial medical examination. (Dec. 2, 8.) The judge found the self-insurer thereby "effectively waived its complaint to discontinue benefits on a medical basis and proceeded solely on its fraud and recoupment allegations, non-medical theories. No active complaint to discontinue by the insurer [sic] survived for Hearing and, therefore, I make no such finding." (Dec. 8.)[3]

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[1] General Laws c. 152, § 45, provides, in pertinent part:

> If the employee refuses to submit to the examination or in any way obstructs it, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.

The procedure an insurer must follow to suspend benefits under § 45 is set forth in 452 Code Mass. Regs. § 1.06(1).

[2] In the order, the judge stated he was unable to quantify the amount of recoupment or assess specific penalty amounts until he heard testimony under oath from witnesses called at hearing. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(proper to take judicial notice of contents of board file).

[3] In conjunction with his appeal, the employee petitioned the commissioner of the department for an enlargement of time to submit the filing fee in order to request a waiver of the fee based on indigency. (Ex. 18.) The commissioner granted the enlargement of time, (Ex. 4), but the employee neither filed the appeal fee nor submitted an affidavit of indigency

The employee's claim at hearing[4] was for § 34 total incapacity benefits from January 1, 2007 through February 2, 2007, § 35 partial incapacity benefits from February 3, 2007 through November 30, 2007, and §§ 13 and 30 medical benefits. (Dec. 4; Tr. I, 33.) The employee appeared on the first day of hearing under subpoena by the self-insurer. (Dec. 7; Tr. I, 43.) On the advice of counsel, he refused to testify, invoking his Fifth Amendment protection against self-incrimination, and did not answer the questions self-insurer's counsel insisted be posed on the record. (Dec. 7; Tr. I, 38-59.) The self-insurer presented its case for § 14 penalties and recoupment through the testimony of the assistant manager at Panera Bread, (Tr. I, 60-96); the employee's Panera Bread employment records, (Exs. 8-11); the report and testimony of its investigator, (Ex. 13; Tr. I, 96-115); a DVD of two days' surveillance, (Ex. 12); and an affidavit from the claims adjuster assigned to the case, (Ex. 15), detailing the $17,115.15 in § 34 weekly incapacity benefits paid to the employee "for the contested period, from January 9, 2007 through October 2, 2007." (Dec. 9-12.)

The judge found that the employee,

> by his counsel, has brought his claim for continuing benefits without reasonable grounds and that he has defended against the insurer's [sic] complaint without reasonable grounds, both acts in violation of M. G. L. c. 152 Sec. 14(1). I find that those unreasonable acts have caused the insurer [sic] to sustain litigation costs and attorney's fees based upon actual post-Conference proceedings including several status conferences, three days of Hearing and closing brief.

(Dec. 18.) The judge did not, however, award any penalty pursuant to § 14(1), which provides, in pertinent part:

> [I]f any administrative judge or administrative law judge determines that any proceedings have been brought or defended by an employee or counsel without reasonable grounds, the whole cost of the proceedings shall be assessed against

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in support of a waiver. Therefore, the department did not schedule an impartial medical examination. (Dec. 2.)

[4] The hearing took place over three days, on April 16, 2009, June 15, 2009 and July 22, 2009. (Dec. 3.) References in this decision to the hearing transcripts are designated, "Tr. I," "Tr. II," and "Tr. III" respectively.

the employee or counsel, whomever is responsible.

Rather, he ordered the employee to pay a penalty under § 14(2), based on the following findings:

> I find that Mr. Aponte knowingly committed fraud upon the self-insurer by failing to notify the company of his work for Panera Bread while still collecting workers' compensation benefits from January through October 2007. His failure was not inadvertent but intentional. I find also that Mr. Aponte was less than truthful with this Court [sic] given the factual variance in his "statements" in comparing his application for employment with Panera Bread (Exhibit 18) and his "testimony" (Exhibit 2) ["Employee's Biographical Data sheet, admitted as if Mr. Aponte had so testified," Dec. 5] as well as his utterance of an inaccurate Social Security number. I find that Mr. Aponte knowingly failed to disclose that which is required by law to be revealed (employment with Panera Bread) and knowingly made a false statement of fact (education and work history, Social Security number).

(Id.) For these fraudulent acts, the judge ordered the employee to pay the self-insurer $5,751.28, six times the state average weekly wage in effect on the date of injury, and the whole cost of the proceedings and attorney's fees, pursuant to § 14(2). Lastly, finding that the employee, by virtue of his refusal to testify, offered no evidence of an inability to pay,[5] the judge ordered him to make full recoupment to the self-insurer in the amount of $17,115.15. (Dec. 18-19.)

On appeal, the employee argues it was error for the judge to conclude that he had violated § 14(1) by prosecuting his claim and defending against the self-insurer's complaint without reasonable grounds. (Employee br. 14-16.) The judge did fumble his handling of the self-insurer's § 14 complaint by improperly comingling the section's two penalty provisions. The employee's violation of § 14(1) called for the assessment of "the whole cost of the proceedings" against him. The penalty for the § 14(2) violation, however, is more severe:

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[5] The employee called two witnesses in his behalf. James Davidson, a Home Depot co-worker of the employee, testified to the heavy physical requirements of an associate's job in the lumber and building materials departments. (Tr. III, 6-10.) The employee's father testified that the employee did work at Panera Bread for a period of time, during which he observed his son having difficulties with his back and complaining of back pain. (Tr. III, 11-20.) Neither witness testified as to the employee's ability to pay the order of recoupment.

> If it is determined that in any proceeding within the division of dispute resolution, a party . . . 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 knew to be illegal or fraudulent, the party's conduct shall be reported to 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.*

General Laws c. 152, § 14(2). (Emphasis added.)[6] We need not address the employee's challenge to the judge's finding of a § 14(1) violation because the judge's order was for penalties under § 14(2), not § 14(1), and the employee does not challenge that order.[7]

The employee also argues that because a past, closed period of disability prior to hearing was involved, referral of the case to a § 11A impartial physician was not

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[6] Culpability under § 14(2) requires that the fraud have occurred "in any proceeding within the division of dispute resolution." See Murphy's Case, 53 Mass. App. Ct. 708, 712 (2002)("only proceedings within one of the four described stages [conciliation, conference, hearing and reviewing board appeal] fall within the scope of § 14(2)"); accord, Leveille v. Munters Corp., 25 Mass. Workers' Comp. Rep. ___ (January 24, 2011). The judge found, *inter alia*, that the work history information in the employee's biographical data sheet, (Ex. 2), admitted in evidence as if the employee had so testified, (Dec. 5), was at "factual variance" with his Panera Bread application for employment. (Ex. 8.) This finding amply supports the judge's conclusion that the employee committed fraud in the hearing -- a proceeding within the division of dispute resolution. In any event, as the employee has not raised this issue on appeal, we deem it waived. See Mancuso v. MIAA, 453 Mass. 116, 128 n.26 (2009); Svonkin v. Falcon Hotel Corp., 20 Mass. Workers' Comp. Rep. 133, 138 (2006).

[7] Moreover, because the § 14(2) penalty included assessment of the whole cost of the proceedings against the employee, which is the only penalty that can be assessed against an employee under § 14(1), the judge's failure to order that same penalty under § 14(1) is harmless.

required under 452 Code Mass. Regs. § 1.02,[8] but he should have been allowed to submit medical evidence probative of the extent of his incapacity from January 1, 2007 through November 30, 2007, in defense of the self-insurer's recoupment complaint. (Employee br. 11-15.) We disagree. It is axiomatic that a medical expert's opinions must rest upon a foundation of either (a) his own direct personal knowledge, or (b) admissible evidence in the record. Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 595 (2000). Any representations the employee made to his doctors did not come into evidence because he did not testify, leaving their reports without a foundation and, therefore, inadmissible. Ferreira's Case, 75 Mass. App. Ct. 1101 (2009)(Memorandum and Order Pursuant to Rule 1:28); further appellate review denied, 455 Mass. 1102 (2009). Moreover, because those representations never materialized as testimony at hearing, the self-insurer was deprived of its due process right to confront and rebut them. Id., citing Haley's Case, 356 Mass. 678, 681 (1970)(procedural due process standards apply to workers' compensation adjudicatory hearings).

The decision is affirmed. So ordered.

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed:

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[8] The regulation provides, in pertinent part:

> Disputes over Medical Issues as used in M.G.L. c. 152, § 11A(2), shall not include any case in which:
>
> (a) the parties disagree solely regarding the entitlement to weekly benefits concerning a specific period or periods of disability or death which occurred prior to the hearing scheduled pursuant to M.G.L. c.152, § 11.