COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 007951-92**
James Pittsley	Employee
Broadway Chiropractic Group	Third Party/Appellee
Brake and Truck Supply, Inc.	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
James F. Fitzgerald, Esq., for the employee
Paul M. Moretti, Esq., for the third party/appellee
Thomas G. Brophy, Esq., for the insurer

WILSON, J. The insurer appeals from a decision in which an administrative judge denied and dismissed its claim for § 14(2) penalties for fraudulent alteration of treatment records by the third party medical provider, Broadway Chiropractic. In an earlier decision, the judge had awarded the insurer the claimed fraud penalties, but reversed himself when presented with new evidence. The first proceeding had been tried on the theory that payments had been made for the employee's foot treatment, but that a balance was due for additional treatments to the employee's back, which never were performed. (Dec. 5.) The parties stipulated in the present proceedings, however, that the insurer had paid nothing on the employee's claim for medical treatment. Moreover, it was not disputed that the bills for the services, with or without the questioned back treatments, were exactly the same. Id. We affirm the decision.

We look first at the procedural history. The reviewing board affirmed the judge's first decision awarding the penalties sought by the insurer. We wrote, "The judge found the employee did not receive treatments for a work-related back injury and that the properly paid treatment records for the foot were falsely altered [to include back

treatments] to induce the insurer to pay additional monies." Pittsley v. Brake and Truck Supply, 10 Mass. Workers' Comp. Rep. 444, 446 (1996). After the Massachusetts Appeals Court granted a stay of the employee's appeal to the Appeals Court with leave to re-open the issue at the department, we recommitted the case to the administrative judge for further proceedings as he deemed appropriate. (Dec. 3.) In the hearing on recommittal, the parties stipulated to non-payment of the $540.85 bill in question. (Dec. 5.) Furthermore, additional evidence was presented that indicated the inadvertent loss of the subject bills and records was due to a computer glitch, and reconstruction of those documents, with the back treatment added, was due to imperfect memories. (Dec. 6-7.) Based on the additional evidence proffered at the recommittal hearing, the judge concluded that, even though Broadway Chiropractic never actually rendered the services to the employee's back on the days at issue, the addition of that treatment to the records indicated no fraudulent intent. (Dec. 9, 12.) As a result, the judge concluded that the evidence did not support a finding that the third party provider had engaged in fraudulent activity violative of § 14(2).[1] (Dec. 12.)

In its appeal, the insurer argues that the erroneous addition of back treatment to the record accompanying the bill for foot treatment, without any change in the amount being billed for the foot treatment actually rendered, constitutes § 14 fraud as a matter of law. The insurer's contention flies in the face of the judge's clear and precise findings of fact: "Since the third party billed the insurer the same $540.85 upon the submission of

[1] General Laws c. 152, § 14(2), provides in relevant part:

> If it is determined that in any proceeding within the division of dispute resolution, a party, including an attorney or expert medical witness acting on behalf of an employee or insurer, 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 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 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 wage in the commonwealth multiplied by six.

documents relating to the treatment of the foot alone, and later for treatment of the foot and back combined, it clearly was not seeking additional money from the insurer. *Based upon the information now before me it is clear that the submission of the second document, Insurer Exhibit B, was not an attempt by the third party claimant to induce additional payments from the insurer.*" (Dec. 6-7; emphasis added.) The import of these two sentences is that whatever the nature of the technical computer failure that caused the loss of the original records, it, together with the imperfect memory of the staff that resulted in the addition of back treatment to the regenerated record, did not constitute an attempt to defraud the insurer. The administrative judge's detailed and thorough findings leave us with no doubt that Broadway Chiropractic did not "knowingly [make] a false statement of fact or law, participate[] in the creation or presentation of evidence which [it knew] to be false, or otherwise engage[] in conduct that [it] knew to be illegal or fraudulent . . . ." § 14(2). It was a mistake – nothing more, nothing less.

The insurer asserts that the evidence compels the conclusion that "Broadway altered the report to induce Liberty to accept liability for the back injury[,]" (Insurer's brief 14), and cites Williams v. Evans Transportation, 12 Mass. Workers' Comp. Rep. 162 (1998). In that case, the reviewing board reversed a judge's denial of a § 14 fraud claim because the judge made all of the requisite findings under the statute that did in fact compel the imposition of the statutory penalties, including that "the employee knowingly made several false statements while under oath in the course of [that] proceeding". Id. at 164. In stark contrast, the judge in the present case determined that, based on the credible testimony of Broadway Chiropractic's office manager, the insurer by its own request initiated resubmission of the original bills and notes and suffered no detriment from the ensuing, compounded errors. (Dec. 6, 9.)

> [T]echnical difficulties resulted in the loss of the original computerized office notes and so a second set was created utilizing the memory of the treating staff. Available records [which indisputably indicated back treatment actually rendered on later dates] were also used to recreate the lost data. A second set of documents was submitted with a bill dated January 4, 1993 along with a second set of office notes. . . . Although the description of services provided differ from the original to the re-created office notes (Insurer Exhibits A and B), respectively, the amount

> of the total bill, the diagnostic codes, and the procedure codes are identical on both sets of bills. . . . Thus, even though the re-created office notes contain additional information concerning treatment for the back, the insurer was never billed for these services.

(Dec. 6.) These findings, together with the judge's findings that the employee did indeed receive treatment for his back and that the insurer, contrary to its assertion at the first hearing, never paid the original bill, leave us hard pressed to understand the insurer's position that the judge erred by not inferring that Broadway Chiropractic had knowingly engaged in fraudulent activity.

The administrative judge's conclusion that there was insufficient evidence to support a finding of either fraudulent activity or activity violative of § 14(2) is affirmed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: October 28, 1999

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William A. McCarthy
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge