

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 012674-05

Jenny Derosiers
HRP Corporation
AIM Mutual Insurance Company

Employee
Employer
Employer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Levine)

The case was heard by Administrative Judge McManus.

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing and on appeal
James N. Ellis, Esq., for the employee on appeal
Linda D. Oliveira, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision awarding § 36 benefits and recoupment, but denying her claim for an attorney's fee pursuant to § 13A(5).¹ The employee maintains that the judge's order for recoupment of \$11,062.05, to be repaid in monthly installments of \$150.00, is a benefit to her, requiring an attorney's fee award. We disagree.

In June of 2007, shortly after her accepted industrial injury, the employee returned to part time work, and, ultimately, full time work, without notifying the insurer,² creating a significant overpayment. (Dec. 4-5, 10.) Further, the earlier hearing decision in this case, filed on April 29, 2008, established an earning capacity resulting in an additional overpayment of \$1,404.30. (Tr. 55.) The judge found the total outstanding overpayment to be \$11,062.05. (Dec. 10.)

¹ General Laws c. 152, § 13A(5), provides for an attorney's fee award when "an insurer files a complaint or contests a claim for benefits and . . . the employee prevails at [the] hearing. . . ."

² The judge found that although the employee informed her attorney of her employment status, she was not advised on how to properly provide that information to the insurer. The reporting omission was therefore determined to be due to "mistake and inadvertence," and not an intent to mislead. (Dec. 10.)

The direct examination of the employee included inquiry into her personal finances. (Tr. 18-24.) The judge found the employee receives \$2,032.00 in monthly income and has monthly expenditures of approximately \$1,900.00. The judge ordered the employee to fully repay the \$11,062.05 overpayment, but at the rate of \$150.00 per month, as there were no current weekly benefits from which overpayments could be recouped pursuant to § 11D(3).³ (Dec. 9-10.) See Brown v. Highland House Apts., 12 Mass. Workers' Comp. Rep. 322 (1998). The manner in which the judge structured the recoupment in her order appears to be a pragmatic acknowledgement of the employee's limited financial resources. This, by itself, does not rise to the level of a "benefit" to be considered in determining whether the employee had a successful outcome. Moreover, the judge's award of \$1,791.62 in § 36 loss of function benefits was no more than what the insurer had offered months prior to the hearing. See 452 Code Mass. Regs. § 1.19(3). As such, we conclude the judge did not err by declining to award counsel fees under § 13A(5). The employee simply did not "succeed[]" on any significant litigation issue." Connolly's Case, 41 Mass. App. Ct. 35, 39 (1996).

We now turn to the question of § 14 liability on the part of counsel for the employee. The insurer offered to pay the entire amount ultimately awarded in § 36 benefits months before the hearing. However, there is evidence⁴ that counsel did not

³ General Laws c. 152, § 11D(3), provides that overpayments may be recovered "by unilateral reduction of weekly benefits, by no more than thirty percent per week."

⁴ The employee testified on cross examination:

Q. At any time were you made aware of an offer of \$1,791.62 made by AIM Mutual Insurance to pay for your loss of function?

A. I was aware of that just a little while ago.

Q. When you say a little while ago, was that this morning?

A. Yes.

Q. So prior to that you were not made aware that any offer had been made to you?

A. No. (Tr. 43-44).

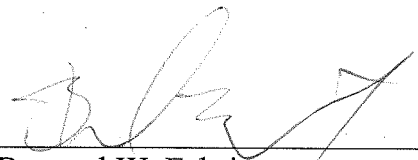
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relay this offer to the employee until the day of the hearing.⁵ (Dec. 6.) Based on this evidence, we invited the parties to brief the issue of whether § 14(2) penalties might be due for counsel's violation of Massachusetts Rules of Professional Conduct 1.4(a),⁶ for failing to inform his client of the settlement offer and frivolously proceeding with litigation.⁷ Additionally, the question of counsel's obligations with regard to the employee's allegedly false or inaccurate testimony on this point was also raised. Following the submission of supplemental briefs, we decline to find a § 14 penalty due.

We also do not go so far as to say that the prosecution of this appeal is "without reasonable grounds" pursuant to § 14(1). To the employee, the payment of recoupment in installments over the course of approximately six years may be better than an order to remit full payment immediately. Even though the advantage to the employee here is not of sufficient merit to support a fee award for "prevailing" pursuant to § 13A(5), the argument to the contrary is not frivolous.

Accordingly, the decision is affirmed.

So ordered.


Bernard W. Fabricant
Administrative Law Judge

⁵ The judge found that the employee "was not aware that she had been given an offer of \$1,791.62 by the [i]nsurer until the date of [h]earing." (Dec. 6.)

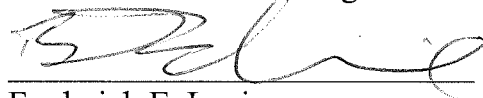
⁶ Rule 1.4(a) provides: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

⁷ Notwithstanding evidence that the employee was unaware of a prior settlement offer, she did submit medical evidence at hearing which could have resulted in an award of § 36 benefits significantly higher than the amount ultimately awarded. (Dec. 10.) Cf. Packard v. Swix Sport USA, Inc., 22 Mass. Worker's Comp. Rep. 305, 307 n.3 (2008), *aff'd Packard's Case*, No. 2009-P-257, Memorandum and Order pursuant to Rule 1:20 (Feb. 26, 2010), *further appellate review denied*, 456 Mass. 1108 (2010).

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Mark D. Horan
Administrative Law Judge



Frederick E. Levine
Administrative Law Judge

Filed:

