COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 025582-96

Joaquin Pellot Rodriguez	**Employee**
James N. Ellis & Associates	**Third Party Claimant**
Carilorz Corporation	**Employer**
Massachusetts Trade SIG	**Insurer**

REVIEWING BOARD DECISION

(Judges Fabricant, Costigan and Horan)

The case was heard by Administrative Judge Constantino.

APPEARANCES

James M. Galliher, Esq., for the employee at hearing
Gillian B. Schiller, Esq., for the third party claimant at hearing
James N. Ellis, Esq., for the third party claimant on appeal

FABRICANT, J. The third party claimant, James N. Ellis & Associates, appeals from an administrative judge's decision upholding a 1998 conference order requiring, *inter alia*, that $1,035 in claimed expenses held in escrow from a lump sum settlement agreement approved on October 17, 1997, be paid to the employee, rather than to the law firm of Ellis and Ellis. The judge found that James N. Ellis, Sr., of James N. Ellis and Associates,[1] had not established he was the successor in

[1] The third party claimant does not appear to dispute that it is James N. Ellis, *Sr*. who is the principal of James N. Ellis and Associates. We note that James N. Ellis, *Jr*., was suspended from the practice of law by a single justice of the Supreme Judicial Court, whose decision was affirmed by the full court, shortly after the lien was filed in the instant case. See In the Matter of James N. Ellis, Jr.; In the Matter of Nicholas J. Ellis, 426 Mass. 332 (1997).

interest to James N. Ellis, Jr., the filer of the 1997 attorney's lien. We affirm the decision.

Joaquin Pellot Rodriguez alleged that he suffered two work-related heart attacks in 1996. (Tr. 100.) In July and November, 1996, he executed fee agreements with the law firm of Bonville and Howard, which filed a compensation claim on his behalf. (Dec. 3-4.) At some point in early 1997, the employee spoke with a representative of the law firm of Ellis and Ellis. (Tr. 12.) On June 3, 1997, James N. Ellis, Jr., then a partner in the firm of Ellis and Ellis, filed a lien pursuant to G.L. c. 221, § 50,[2] [2]for $1,035 in attorney's expenses allegedly incurred during his firm's representation of the employee for his work-related injuries. On October 17, 1997, the employee entered into a lump sum agreement to settle his claim. (Dec. 3.) An administrative judge approved the settlement but ordered that $1,500 in attorney's fees and $1,035 in attorney's expenses be held in escrow pending resolution of the asserted attorney's lien. (Tr. 11.)

On November 10, 1997, James M. Galliher, of the law firm of Bonville and Howard, filed a "Third Party Claim/Notice of Lien" for $1,500 in attorney's fees. That claim was scheduled for a § 10A conference, at which time Attorney Galliher

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[2] General Laws Chapter 221, § 50, provides:

> From the authorized commencement of an action, counterclaim or other proceeding in any court, or appearance in any proceeding before any state or federal department, board or commission, the attorney who appears for a client in such a proceeding shall have a lien for his reasonable fees and expenses upon his client's cause of action, counterclaim or claim, upon the judgment, decree or other order in his client's favor entered or made in such proceeding, and upon the proceeds derived therefrom. Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien; provided, that the provisions of this sentence shall not apply to any case where the method of determination of attorneys' fees is otherwise expressly provided by statute.

filed a motion to strike the attorney's lien of Ellis and Ellis.[3] Following the conference, the administrative judge ordered the insurer to pay Bonville and Howard the $1,500 escrowed attorney's fee. The judge also ordered the insurer to pay the employee, rather than Ellis and Ellis, the $1,035 in claimed expenses which had been escrowed. ("Order of Payment of Attorney's Fees Pursuant to Section 13A," filed June 30, 1998.) James N. Ellis, Sr. appealed the conference order on or about July 13, 1998. (Dec. 3-4.)

The case was heard on January 28, 2005. The only witnesses were the employee and James N. Ellis, Jr. (Dec. 1.)[4] At that hearing, James N. Ellis and Associates

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[3] Although it was Bonville and Howard's third party claim which initiated the dispute resolution process, Ellis & Associates appealed the conference order and hearing decision. Thus, the judge appropriately lists Ellis and Associates as the third party claimant. See Cordeiro v. New England Specialized Concrete, 22 Mass. Workers' Comp. Rep. ___ (December 18, 2008)(where Ellis and Associates filed claim for release of fee held in escrow after acknowledging Attorney Pierce was entitled to a portion of fee, Attorney Pierce became de facto third party claimant, not a lienholder, per se).

[4] The testimony centered on whether the employee had authorized the law firm of Ellis and Ellis to represent him in January 1997. The employee maintained he went to a satellite office of Ellis and Ellis in January 1997 to assist a friend, who spoke less English than he did, with his claim. (Tr. 24.) The employee testified that after his friend was finished, he told the Ellis and Ellis representative about his own problem. Id. The employee said he told the representative he had an attorney but could not remember his name. (Tr. 25.) He testified that, although he signed some forms, he did not understand he had hired a new lawyer. (Tr. 38.) The judge credited the employee's testimony. (Dec. 4.) James N. Ellis, Jr., submitted undated documents in support of his position that the employee hired Ellis and Ellis to represent him in his compensation claim. (Ex. 2, 3, 4, 5.) In addition, Mr. Ellis testified that, although the employee never attended an examination by a physician, Ellis and Ellis incurred expenses in connection with obtaining the employee's medical records and setting up medical examinations. (Tr. 64-68.) He submitted copies of letters and checks allegedly sent to physicians requesting that they

asserted that in January 1997, the employee retained Ellis and Ellis to represent him in his compensation case, and that the firm incurred expenses as a result of its representation. (Tr. 48-56.)

The judge found, *inter alia*, that James N. Ellis, Jr., of 16 Norwich Street, Worcester, Massachusetts, filed an attorney's lien pursuant to G. L. c. 221, § 50, seeking expenses of $1,035.75.[5] He further found no evidence was presented that the party asserting the lien at hearing, James N. Ellis, Sr., of 8 Norwich Street, Worcester, Massachusetts, was the "legal assignee or successor in interest of the Law firm [sic] of James N. Ellis, Jr. and Associates, which filed the lien in this case."[6] (Dec. 4-5.) Therefore, the judge determined that the conference order requiring the escrowed expenses be paid to the employee should be the "final resolution" of the matter.[7]

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examine the claimant and issue reports, as well as requests for medical records. (Ex. 7.)

[5] At hearing, James N. Ellis, Jr. agreed that the claim for expenses had been reduced to $735.75. (Tr. 11, 67.)

[6] The judge referred to "the Law firm James N. Ellis, Jr. and Associates" as the party who filed the lien. (Dec. 5, Finding #10.) However, there is no evidence in the record that a law firm by that name filed a lien in this case, or even existed. We infer that the judge was referring to James N. Ellis Jr.'s firm, Ellis and Ellis. This confusion as to the correct names of the individuals and firms involved in this case underscores the necessity for evidence regarding the successor to the original filer of the lien. No such evidence was produced by the third party claimant. See discussion, *infra*.

[7] The judge also found that James N. Ellis, Jr., never filed an appearance with or commenced an action in the Department of Industrial Accidents on behalf of Mr. Rodriguez. (Dec. 5.) The third party claimant does not dispute the accuracy of these findings, but argues that whether or not an action is commenced is not dispositive of the question of whether a lien may be maintained pursuant to c. 221, § 50. We need not address this issue because we hold as dispositive the judge's

(Dec. 5) In response to the finding that Ellis, Sr. was not the successor in interest to Ellis, Jr. and/or Ellis and Ellis, the third party claimant argues that the issue of standing[8] was not raised by the employee or by the administrative judge at hearing, and no evidence on the subject was proffered; therefore the judge's finding on this issue goes beyond the issues of the claim. (Third Party Claimant br. 10.) We disagree. Standing is an element of subject matter jurisdiction, and may be raised *sua sponte* by the court.[9] Neither the employee nor the insurer has filed an appellate brief. We find no error in the judge's findings as described above.[10] [10]

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finding that no evidence was presented establishing James N. Ellis, Sr., was the successor in interest to James N. Ellis, Jr., or to Ellis and Ellis. Cf. Cordeiro v. New England Specialized Concrete, supra (although attorney failed to satisfy prerequisites for asserting statutory lien, he was nevertheless entitled to a portion of attorney's fee because, by agreement between the parties, fees were placed in escrow at the time of the lump sum). Similarly, it is not necessary to address the third party claimant's argument that the evidence does not support the judge's finding the employee never retained the law offices of Ellis and Ellis. (Dec. 4.)

[8] See 1A C.J.S. Actions § 101 (2005):

> A determination as to whether a plaintiff has standing to bring a particular action is . . . a threshold requirement which must be met before a court may properly proceed to consider the merits of the action. . . . [S]tanding consists of an entity's sufficient interest in the outcome of litigation to warrant consideration of its position by a court. It is the legal right to set the judicial machinery in motion, but is not a procedural technicality. Standing is, rather, that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims . . . and must be defined on a case-by-case basis. . . .

[9] In any event, the issue of whether the third party claimant had standing, as the successor in interest to James N. Ellis, Jr. of the law firm of Ellis and Ellis, was asserted by the employee in his brief submitted following the hearing. (Closing Argument of Employee Joaquin P. Rodriguez.) The third party claimant reserved its right to file a reply brief after receipt of the employee's brief, (see third party

However, even if the issue of standing had not been raised below, the administrative judge permissibly could have addressed the issue, as could this board. This is because standing is treated as an issue of subject matter jurisdiction. Boston v. Rochalska, 72 Mass. App. Ct. 236, 240 n.9 (2008), citing Ginther v. Commissioner of Ins., 427 Mass. 319, 322 (1998). As such, it cannot be waived by the parties. Boston v. Rochalska, supra, citing Braun v. Braun, 68 Mass. App. Ct. 846, 852 (2007). It must be decided, regardless of the point at which it is first raised, even after adjudication and on appeal. Litton Business Sys., Inc. v. Commissioner of Revenue, 383 Mass. 619, 622 (1981); Boston v. Massachusetts Port Auth., 364 Mass. 639, 645 (1974); see also The Locator Services Group, Ltd. v. Treaurer and Receiver General, 443 Mass. 837, 846 n.12 (2005)(court addressed jurisdictional issue of standing even though treasurer no longer disputed plaintiff's standing). Thus, the judge did not err in addressing this issue.

Generally, one "who lacks individual standing may not assert the right of others not before the [tribunal]." Klein v. Catalano, 386 Mass. 701, 714 (1982). Because James N. Ellis, Sr. did not show, as a threshold matter, that he had succeeded to the interests of James N. Ellis, Jr. and Ellis and Ellis, he had no standing to enforce the lien filed by Ellis, Jr. The evidence supports the judge's decision on this issue. All of the exhibits submitted at hearing on behalf of the third party claimant purportedly created in January and March of 1997, when it maintains the employee retained its services, reference the law firm of Ellis and Ellis, not Ellis and Associates. (See Ex. 2, 3, 4, 5 and 7.) The only attorney's signature on any of the

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claimant's Closing Argument), but did not do so, nor did it request that the judge re-open the evidence. Thus, the employee did raise the issue of whether the third party claimant had standing, as the successor in interest to Ellis and Ellis or James N. Ellis, Jr., to pursue the lien filed in 1997. See also Choquette v. Matson Community Services, 23 Mass. Workers' Comp. Rep. ___ fn. 3 (Jan. 13, 2009).

[10] Although the judge determined in his decision that the June 30, 1998 conference order was to be the "final resolution of this proceeding," (Dec. 5), he clearly conducted a de novo hearing. We thus do not find any merit in the third party claimant's argument the judge relied on a conference proceeding tainted by due process violations.

documents admitted as exhibits is that of James N. Ellis, Jr., not James N. Ellis, Sr. (See Ex. 7.) There was no evidence before the administrative judge establishing that James N. Ellis, Sr., or the law firm of Ellis and Associates, is the successor in interest to James N. Ellis, Jr., or the law firm of Ellis and Ellis.[11] See 452 Code Mass. Reg. § 1.11(5)("The decision of the administrative judge shall be based solely on the evidence introduced at the hearing").

Accordingly, we affirm the judge's decision.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **March 23, 2009**

[11] See also, Mass.R.Civ.P. 17, which provides that, with one exception, "every action shall be prosecuted in the name of the real party in interest." See Henderson v. D'Annolfo; Richard H. Dodge Electrical Contractors, Inc., 15 Mass. App. Ct. 413, 428 (1983)(court addresses standing of plaintiff to bring action in terms of whether plaintiff is real party in interest). Although the Rules of Civil Procedure do not apply to proceedings before the board, they may provide instruction by analogy. See Stacey v. North Shore Children's Hospital, 8 Mass. Workers' Comp. Rep. 365, 369 n.2 (1994).