COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 021577-04

Joseph Vallieres	Employee
Charles Smith Steel, Inc.	Employer
American Home Assurance Ins. Co.	Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

The case was heard by Administrative Judge Bean.

APPEARANCES

Rickie T. Weiner, Esq., and Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
James E. Ramsey, Esq., for the insurer at hearing
William C. Harpin, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision denying his claim for § 36 benefits in excess of the amount ordered at conference, while allowing the insurer's request for recoupment of the § 13A(4) attorney's fee and expenses awarded at conference. We summarily affirm the decision on the § 36 issue. However, we reverse the decision insofar as it authorized the insurer to recoup the attorney's fee and expenses paid pursuant to the conference order.

The judge made the following general findings pertinent to the recoupment issue:

> [T]he employee is not entitled to any § 36 benefits beyond the $5863.97 that has already been paid. The insurer submitted an offer to pay that amount in a letter sent to the employee and his attorney dated March 5, 2007 and entered into evidence as exhibit 4. Because the letter was sent a month prior to the conference, and because I ordered no benefits to be paid in excess of the offer, the regulation 452 C.M.R. 1.19(3) applies to this case. The employee's attorney is not entitled to payment of an attorney's fee nor is he entitled to recoup his expenses. The insurer has asked that it be permitted to recoup those payments. That claim is allowed.

(Dec. 352.) The employee argues the judge's order of recoupment was error. We agree. Because the insurer did not appeal the order, the insurer's claim for recoupment was not properly before the judge at the hearing. Under the terms of § 10A(3),[1] by failing to appeal, the insurer accepted the terms of the conference order, including the award of an attorney's fee and expenses.

The insurer argues that one party's appeal from a conference order brings the entire case to the hearing de novo, permitting the non-appealing party to raise an issue for determination as if it *had* appealed. The insurer relies on our decision in Karamanos v. J.K. Luncheonette, 5 Mass. Workers' Comp. Rep. 405 (1991), as authority for its argument. Its reliance is misplaced. In Karamanos, we construed an entirely different version of § 10A, which was applicable to the employee's June 30, 1987 date of injury. Id. In that prior version of the statute, the conference order did not become final until *both* parties filed a written notice of satisfaction: "Any temporary orders shall become permanent upon receipt of notice by the member from both parties of an indication that they are satisfied with the provisions of the temporary order and in such instances any subsequent scheduled proceedings shall be cancelled." G. L. c. 152, § 10A (St. 1985, c. 572, § 24). In Karamanos, the insurer had so accepted the conference order, but the employee had not. The language used by the reviewing board must be seen in that context: "[T]he hearing is a de novo proceeding, and the fact that the insurer in this case accepted payment at the conference level did not preclude the insurer from raising the defense of liability at the hearing level, where issues are raised anew. [Citations omitted]. . . . In failing to sign the

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[1] The present version of General Laws c. 152, § 10A(3), inserted in 1988, provides, in pertinent part:

> Any party aggrieved by an order of an administrative judge shall have fourteen days from the filing date of such order within which to file an appeal for a hearing pursuant to section eleven.
>
> . . .
>
> Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings, except that a party who has by mistake, accident or other reasonable cause failed to appeal an order within the time limited herein may within one year of such filing petition the commissioner of the department who may permit such hearing if justice and equity require it, notwithstanding that a decree has previously been rendered on any order filed, pursuant to section twelve.

letter of satisfaction and appealing the conference order, the employee took the risk that the insurer would raise the defense of liability at the hearing level and the administrative judge would decide in the insurer's favor." Id. at 407. Thus, under the statute in effect in Karamanos, the conference order could not be said to constitute a final adjudication of any issue.[2]

However, § 10A was amended in 1987 (St. 1987, c. 662, § 12), inserting the language of paragraph (3). See footnote 1, supra. The present version changed the effect of the parties' action vis-à-vis the conference order, from one which required the affirmation of both parties to render it final, to one which automatically becomes final, *unless* at least one party appeals it. Stated another way, the insurer's notice of satisfaction under the earlier version in Karamanos did not change the automatic movement of the case to hearing absent mutual action by the employee. The present version, on the other hand, *requires* a party to appeal if it is unsatisfied with all, or part, of the conference order.[3] Moreover, § 10A(3) is explicit regarding the consequences of a party's failure to appeal: "[f]ailure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings. . . ." This language was absent from the statute's prior version. Thus, we view the new § 10A(3) as being consistent with conventional appellate practice, in keeping with the general rule that an appellee cannot

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[2] We have previously signaled our rejection of the Karamanos approach. For example, in Gelin v. Vinny Testa's Restaurant, 22 Mass. Workers' Comp. Rep. 221, 223 (2008), we concluded the judge erred by deciding the case on the basis of initial liability, when only the employee had appealed from the conference order awarding medical benefits. More recently, in Bland v. MCI Framingham, 23 Mass. Workers' Comp. Rep. ___ (September 10, 2009), we concluded an insurer's failure to appeal the conference order awarding the employee a § 8(5) penalty barred it from recoupment of that penalty, when the hearing decision resulted in an overpayment of the benefits upon which the penalty was based. See also Wilmore v. Advanced Information Technologies, 21 Mass. Workers' Comp. Rep. 3, 5 (2007)(by failing to appeal, insurer lacked right to challenge closed period of benefits); Doherty v. Shaw's Supermarkets, 19 Mass. Workers' Comp. Rep. 334, 341 (2005)(same).

[3] For example, an employee's appeal from a conference order, on the issue of average weekly wage only, would not permit litigation of other issues in the absence of an appeal by the insurer, or the joinder of other claims or complaints (for example, by a motion based on newly discovered evidence or a subsequent change in circumstances). Of course, the employee retains the burden of proof on all issues properly raised. See footnote 5, infra.

achieve a more favorable result by failing to appeal. See, e.g., Boston Edison Co. v. Boston Redevelopment Auth., 374 Mass. 37, 43 n.5 (1977).

Accordingly, in view of the 1987 amendment of § 10A(3), we reject Karamanos as governing authority. Insofar as the § 11 hearing has been referred to as a "de novo"[4] proceeding, we interpret that phrase as requiring proof anew respecting those issues brought to it by an appealing party only.

Our interpretation is also consistent with what we glean as the clear legislative intent to establish a system which narrows the issues as litigants proceed through the dispute resolution process, mindful that the employee's burden of proof remains on all elements of the claim *sub judice*. G. L. c. 152,

§§ 7(1),[5] 8(1), [6] and 11A(2);[7] see Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997)("Our system of dispute resolution is out of focus - and will harm employees as

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[4] We note the phrase "*de novo*" does not appear in General Laws c. 152.

[5] General Laws c. 152, § 7(1), provides:

> Within fourteen days of an insurer's receipt of an employer's first report of injury, or an initial written claim for weekly benefits on a form prescribed by the department, whichever is received first, the insurer shall either commence payment of weekly benefits under this chapter or shall notify the division of administration, the employer, and, by certified mail, the employee, of its refusal to commence payment of weekly benefits. The notice shall specify the grounds and factual basis for the refusal to commence payment of said benefits . . . .
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> Any grounds and basis for noncompensability specified by the insurer shall, unless based upon newly discovered evidence, be the sole basis of the insurer's defense on the issue of compensability in any subsequent proceeding. An insurer's inability to defend on any issue shall not relieve an employee of the burden of proving each element of any case.

[6] General Laws c. 152, § 8(1), provides, in pertinent part:

> An insurer which makes timely payments pursuant to subsection one of section seven, may make such payments for a period of one hundred eighty calendar days from the commencement of disability without affecting its right to contest any issue arising under

well as insurers - if we allow it to broaden rather than narrow areas of disagreement and increase rather than decrease the unpredictably of outcome in a case."); see also Ginley's Case, 244 Mass. 346, 348 (1923)(burden of proof on all elements of the claim is on the employee on matters "not conceded by the insurer"); see generally, Murphy v. Commissioner of the Dept. of Industrial Accidents, 415 Mass. 218, 223 -225 (1993)(for a discussion of the department's dispute resolution process).

Accordingly, we reverse the decision insofar as it authorizes the insurer to recoup the § 13A(4) fee and expenses awarded at conference, as the insurer, by failing to appeal from the conference order, did not preserve the issue for determination at hearing.[8] We otherwise summarily affirm the decision.

> this chapter. An insurer may terminate or modify payments at any time within such one hundred eighty day period without penalty if such change is based on the actual income of the employee or if it gives the employee and the division of administration at least seven days written notice of its intent to stop or modify payments and contest any claim filed. The notice shall specify the grounds and factual basis for stopping or modifying payment of benefits and the insurer's intention to contest any issue. . . .
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> Any grounds and basis for noncompensability specified by the insurer shall be the sole basis of the insurer's defense on the basis of compensability, unless based on newly discovered evidence; provided, however, that an insurer's inability to defend on any issue shall not relieve an employee of the burden of proving each element of any case.

[7] General Laws c. 152, § 11A(2), provides, in pertinent part:

> When any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order pursuant to section ten A, the parties shall agree upon an impartial medical examiner from the roster to examine the employee and submit such choice to the administrative judge assigned to the case within ten calendar days of filing the appeal, or said administrative judge shall appoint such examiner from the roster.

[8] We also note the insurer did not petition the commissioner for an extension of time, up to a year, in which to file an appeal from the conference order due to "mistake, accident or other reasonable cause." See footnote 1, supra.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **December 16, 2009**