

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO.: 009534-06

Kevin Cotter
Hawkeye Construction Co.
Arch Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Horan)

APPEARANCES

Mathew P. Smith, Esq., for the employee at hearing and on appeal
Paul A. Gargano, Esq., for the employee on appeal
David M. O'Connor, Esq., for the insurer

COSTIGAN, J. In Cotter v. Hawkeye Constr. Co., 22 Mass. Workers' Comp. Rep. ____ (June 27, 2008), we affirmed an administrative judge's decision denying and dismissing the employee's claim, due to his attorney's refusal to go forward at hearing and present evidence to meet the employee's burden of proof. We also found the employee's appeal of that decision was brought and pursued without reasonable grounds and, therefore, that his attorneys should be penalized under the provisions of G. L. c. 152, § 14(1).¹ We retained jurisdiction of the case for the sole purpose of determining "the whole cost of the proceedings" due under § 14(1).

Pursuant to our directive, insurer's counsel provided us with an affidavit of the fees and costs incurred by the insurer in defense of the employee's appeal. Employee's counsel failed to respond or otherwise challenge the amount claimed by the insurer within the time allotted.² Having

¹ That statute provides, in pertinent part:

If any . . . administrative law judge determines that any proceedings have been brought . . . by an employee or counsel without reasonable grounds, the whole cost of the proceedings shall be assessed against the employee or counsel, whomever is responsible.

² After this board filed its first decision, Attorney Gargano sent several letters to the senior judge, some of which correspondence was ex parte, in violation of 452 Code Mass. Regs. § 1.17.

reviewed the insurer's affidavit, we find no reason to question the \$3,494.50 amount claimed as incurred in defense of the employee's appeal to the reviewing board.

Accordingly, pursuant to § 14(1), we order employee's counsel to pay the insurer a penalty in the amount of \$ 3,494.50.

So ordered.

Patricia A. Costigan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: **September 9, 2008**

We neither consider nor accept such correspondence as his response to the insurer's affidavit of costs.