COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 020128-05**

Ladys Zavalu	Employee
Standard Thompson Corp.	Employer
Ins. Comp. State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Levine and Koziol)

The case was heard by Administrative Judge Heffernan.

APPEARANCES
Rickie T. Weiner, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee on brief
Joseph B. Bertrand, Esq., for the insurer

HARPIN, J. The employee appeals from a decision finding a violation of G. L. c. 152, § 14(1)(bringing a claim for payment of medical benefits without reasonable grounds), and awarding $6,373.96 to the insurer for its costs associated with the proceedings, and the same amount to the department for its costs, both amounts to be paid by the employee's attorney. We affirm in part and recommit for further findings regarding an award of an attorney's fee.

In a November 7, 2005 conference order, the employee was awarded § 35 partial incapacity benefits from June 20, 2005, the date of the industrial injury, to September 8, 2005, along with unrestricted medical benefits under §§ 13 and 30. The employee appealed. At the subsequent hearing on December 8, 2006, the employee submitted, for her allowed gap medical records, Dr. Sheela Gurbani's treatment notes from June 20, 2005, to June 1, 2006.[1] In a hearing decision dated April 24, 2008, the judge reiterated his prior award of § 35 benefits from June 20,

[1] The records are contained in the board file and are listed in the hearing decision of April 24, 2008. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002) (permissible to take judicial notice of board file).

2005, to September 8, 2005, but limited the payment of medical bills under §§ 13 and 30 to causally related medical treatment from the date of injury to September 8, 2005. The employee appealed the decision to the reviewing board, which we summarily affirmed on May 5, 2009. The employee then filed a timely appeal with the Appeals Court. (Dec. 4.)[2]

On August 31, 2009, while the appeal to the Appeals Court was pending, the employee filed a new claim, seeking payment of the unpaid March 7, 2006 and May 8, 2006 medical bills of Dr. Gurbani. The insurer denied the claim, raising res judicata as a defense, ("based on Judge Heffernan's prior decision and the Reviewing Board's affirmance"), and sought penalties under §§ 14(2) and (3).[3] At the December 14, 2009 conference on the employee's claim, the insurer raised the defenses of res judicata and causal relationship, and amended its complaint for penalties to §§ 14(1) and (2).[4] The employee's claim and the insurer's § 14

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[2] The pages of the decision are not numbered. We have numbered them sequentially from the first page for ease of reference. All pages of a decision should be numbered; without pagination there is the potential for unnecessary confusion.

[3] The department does not have jurisdiction over claims for §14(3) penalties, as that is a criminal statute. Blais v. Gallo Constr. Co. Inc., 25 Mass. Workers' Comp. Rep. 351, 356 n.8 (2011)

[4] G. L. c. 152, §§ 14(1), and (2), provide, in relevant part:

> (1) . . . If any administrative judge or administrative law judge determines that any proceedings have been brought or defended 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.
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> (2) 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 in 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

complaint were denied in a subsequent conference. Both parties filed timely appeals. (Dec. 3, 5.)

A hearing was scheduled on the appeals for April 23, 2010, but it did not take place, as the employee filed a motion the day before to continue the hearing, noting that a favorable outcome in the then-pending Appeals Court appeal "is requisite in order that the pending litigation proceed." The judge continued the hearing to August 17, 2010. (Insurer br. 3; Employee's Motion to Continue hearing, April 22, 2009[5]).

On August 5, 2010, the Appeals Court affirmed the summary decision of the reviewing board. The following day, the employee withdrew her claim for payment of the medical bills. The hearing scheduled for August 17, 2010, did not take place, although the judge held a status conference on that date and requested briefs on whether the employee's withdrawal of her claim ended the insurer's pending complaint for §§ 14(1) and (2) penalties. The employee objected to holding any hearing, a position which she has maintained throughout this appeal. (Employee br. 12-16.) The judge nevertheless held a hearing on April 4, 2011, at which time the employee and the insurer argued their respective positions and submitted numerous exhibits. (Dec. 5).

On July 12, 2012, the judge issued his decision, in which he denied the employee's motion to dismiss the insurer's complaint for § 14 penalties, found the

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> and attorneys' fees, a penalty payable to the aggrieved insurer or employee, in an amount not less than the average weekly wage in the commonwealth multiplied by six. A copy of any order or decision requiring the payment of penalties by an attorney under this section shall be referred to the board of bar overseers. . . . Any action provided in this subsection shall be brought by an employee or insurer in the department, or by an employee, employer or insurer in the superior court department of the trial court for the county in which the injury occurred or in the county of Suffolk; provided, however, that if presented to the superior court for the county of Suffolk, the court may, on motion of any party in interest, order the case removed to the superior court for the county in which the injury occurred.

[5] Rizzo, supra. See note 1.

employee had brought her claim without reasonable grounds in violation of § 14(1), and assessed the whole cost of the proceedings (conciliation, conference and one day of hearing) against her counsel. The judge did not find the employee's counsel to have engaged in fraudulent conduct, and thus did not find a violation of § 14(2). In regard to the § 14(1) penalty, the judge ordered the employee's counsel to pay the insurer a total of $6,373.96, which he found was equal to a conference fee of $1,062.34 and a hearing fee of $5,311.62.[6] In addition, the judge ordered the employee's counsel to pay the department a similar penalty of $6,373.96, "for the costs of the Conciliator, Administrative Judge, and support services including the Hearing Stenographer." (Dec. 14). This appeal followed.

The employee raises four arguments. She asserts the litigation before the department ended with her withdrawal of her claim on August 6, 2010, and therefore the judge had no authority to hold a hearing and issue a decision on the insurer's complaint for §§ 14(1) and (2) penalties. Second, she argues there was no violation of § 14(1), alleging that the issue of the payment of the medical bills in question had not been raised at the earlier 2005 hearing, and thus could be raised in the present proceeding, citing § 16.[7] Third, she argues that the

[6] The statutory non-liability conference and hearing fees on the date of the decision were $1,062.34 and $5,311.62, respectively. Circular Letter 339 (October 4, 2011). See G. L. c. 152, § 13A(10)(providing for the annual adjustment of attorney's fees payable under § 13A[1]-[6] on October first of each year).

[7] G. L. c. 152, § 16 provides, in pertinent part:

> When in any case before the department it appears that compensation has been paid or when in any such case there appears of record a finding that the employee is entitled to compensation, no subsequent finding by a member or the reviewing board discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res adjudicata as a matter of law, and such employee or his dependents, in the event of his death, may have further hearings as to whether his incapacity or death is or was the result of the injury for which he received compensation; . . .

assessment of penalties equal to conference and hearing fees against her counsel was arbitrary, capricious and an abuse of discretion. Lastly, she asserts that she is entitled to a hearing fee, as the insurer's claim for § 14(2) penalties was denied by the judge.

At the outset, we note the judge made no subsidiary findings of fact supporting the award of § 14 penalties, other than a recitation of the procedural background of the case, and a notation that the employee's counsel did not file a complaint in Superior Court for enforcement of the conference order during the period from November 7, 2005, to April 24, 2008. (Dec. 6). The bulk of his decision consists of a recitation of the employee's Motion for a Directed Verdict, and her Motion to Dismiss the Insurer's Request for § 14 Penalties, both of which he denied. After noting his denial of the motions, the judge proceeded to a General Finding of Fact that "the Employee has brought this claim without reasonable grounds . . . ." (Dec. 13.) However, because the employee has not raised an issue as to the lack of subsidiary findings supporting the conclusion that she brought the claim "without reasonable grounds," we consider it waived. Dennen v. Addison Gilbert Hosp., 5 Mass. Workers' Comp. Rep. 289, 292 n. 4 (1991) (party's failure to raise an issue on appeal waives that issue).

Effect of the Withdrawal of the Employee's Claim

The employee asserts her withdrawal of her claim for medical benefits on August 6, 2010, "left nothing for the administrative judge to adjudicate on August 17, 2010 when the matter was scheduled for hearing," as the insurer's penalty claims were asserted as defenses to the employee's claim and not as separate claims. (Employee br., 12, 14). The insurer counters that its § 14 complaint was properly before the judge "as the insurer pursued it." (Insurer br., 5).

The insurer's apparent tautology is, in fact, the answer to this issue. The raising of potential § 14 penalties by the insurer in its denial of the employee's initial claim and its pursuit of the penalties under that statute, through the conference and hearing, was not a defense to the claim, as urged by the employee,

but was a separate complaint brought forward for decision. Williams v. Evans Transp., 12 Mass. Workers' Comp. Rep. 162, 164-165 (1998)(insurer need not bring a separate claim for § 14 penalties when the basis for the penalty is contained within a proceeding). Had the insurer not "pursued it" after the conference denial, by filing a timely appeal, it would have lost the opportunity to seek such penalties. G. L. c. 152, § 10A(3); Bland v. MCI Framingham, 23 Mass. Workers' Comp. Rep. 283, 289 (2009)(insurer, by not appealing a conference order awarding a § 8[5] penalty against it, "accepted liability for payment of the penalty"). "Failure to file a timely appeal. . . shall be deemed to be acceptance of the administrative judge's order." Aguiar v. Gordon Aluminum Vinyl, 9 Mass. Workers' Comp. Rep. 103, 110 (1995). See also Cerasoli v. Hale Dev., 13 Mass. Workers' Comp. Rep. 267, 269 (1999).

The insurer's complaint for § 14 penalties was therefore separate from its defenses to the employee's original claim for payment of medical bills, and thus it survived the employee's withdrawal of that claim once the Appeals Court affirmed our summary disposition of the earlier appeal. There was no error in the scheduling and holding of a hearing on the insurer's complaint.

Assessment of § 14 Penalties and Issue Preclusion

The employee next argues the judge erred in assessing § 14 penalties, as she and her counsel did not raise the reasonableness, necessity,[8] and causal

[8] "Although commonly used, the statutory support for the 'reasonable and necessary' standard is nonexistent." Donovan v. Keyspan Energy Delivery, 22 Mass. Workers' Comp. Rep. 337, 337 n.1 (2008); Lewin v. Danvers Butchery, Inc., 13 Mass. Workers' Comp. Rep. 18, 19-20 n.1 (1999)("'[a]dequate and reasonable' relates to the nature of the hospital or medical services," whereas "'[n]ecessary' relates to the length of time an employee may be entitled to such health care services. It was added to the statute in 1948 when the duration of medical benefits was expanded to an indefinite period from what had earlier been limited to a few weeks").

relationship of the medical treatment charges at the hearing in 2006, because neither was informed by the insurer that it had rejected payment for the treatment. (Employee br. 17.) The employee also argues that determinations of the appropriateness of medical treatment and causal relationship are never final, citing G. L. c. 152, § 16. The insurer counters by noting that res judicata and collateral estoppel acted to prevent the filing of the 2009 claim, as the 2008 decision and our summary disposition "were enforceable adjudications that could only be tested by appeal." (Insurer br., 12).

The issue essentially is whether a claim for payment of medical treatment denied at a prior hearing, but still being actively appealed at the Appeals Court, can operate to bar the determination of a similar, but later claim, either because it is a waste of judicial resources, or through the doctrine of issue preclusion. If a claim is barred, the question then becomes whether the filing of a later claim and its pursuit, up to the point that the appeal to the Appeals Court of the first claim results in the court's affirmation of its denial, constitutes an objective violation of § 14(1).

The employee's counsel was aware as early as May 31, 2006, that Dr. Gurbani's bills had not been paid, because that day the attorney sent a letter to Gallagher Bassett Services, the third party administrator, seeking payment of an "itemized bill from the attending neurologist." (Employee Ex. 2). While the bill itself is not attached to that exhibit, a later "itemized bill" showing dates of service of March 7, 2006, May 8, 2006, and June 26, 2006, was introduced as part of a different exhibit.[9] (Employee Ex. 5; Insurer Ex. 3). Gallagher Bassett rejected the March 7, 2006 bill on April 19, 2006, because it constituted "Treatment after benefits terminated." Id. On June 8, 2006, Gallagher Bassett rejected bills for the March and May dates of service, stating that: "The claim is controverted." Id.

[9] The doctor did not bill the "Insurance" for the June 26, 2006 date of service, "because two previous was [sic] unpaid." (Employee Ex. 5). Thus, the only bills that could have been included in the 2006 hearing were for the March and May dates of service.

Both of these rejections were sent to Dr. Gurbani. The letters do not show whether they were also sent to the employee or her counsel, but the record is clear the employee had knowledge of the unpaid bills.

The employee gives no reason for filing a claim for payment of the medical bills after the 2008 hearing decision, other than quoting from § 16 to the effect that "decisions regarding . . . need for treatment . . . are never final." (Employee br. 18). Yet § 16 covers treatment obtained only after the close of evidence of a prior hearing decision; it is not, nor can it be, concerned with treatment rendered before the close of evidence. Glowinkowski v. KLP Genlyte, 18 Mass. Workers' Comp. Rep. 203, 205 (2004), citing Dunphy v. Shaw's Supermarkets, 9 Mass. Workers' Comp. Rep. 473, 475-476 (1995). The treatment in question took place eight months and six months *prior* to December 8, 2006, the date of the hearing. Thus § 16 does not apply.

The real issue is that the employee, while the denial of her claim for payment of the medical bills was pending before the Appeals Court, filed a claim for the same bills with the department. In effect, the employee had two separate sequential claims for the identical benefit. Had the Appeals Court reversed the reviewing board and held that the judge incorrectly limited the time period for the employee's medical treatment, the case would have been remanded to the judge for further findings on the payment of the bills. The employee's original claim would thus have sufficed to preserve her right to seek that payment, making the second claim redundant. The Appeals Court's affirmation of the denial of the post-September, 2005, treatment made that second claim moot, a fact acknowledged by the employee when she withdrew her claim. In either case, therefore, the second claim had no bearing on the preservation of the employee's rights, and instead served only to waste judicial resources at the department with a claim that had no possibility of resulting in a valid judgment. Mancuso v. Kincha, 60 Mass.App.Ct. 558, 569 (2004)(allowing multiple, serial actions where the central factual issue was the same in all the claims is a waste of judicial resources).

It is the filing of the second claim, therefore, that amounted to a frivolous act -- "without reasonable grounds" -- by the employee.

The insurer argues that the employee's claim was barred by the doctrine of issue preclusion, as the question of the payment of all the employee's medical treatment had been before the judge at the first hearing and had been decided by denying payment for treatment after September 8, 2005.[10] The decision therefore constituted "an absolute bar to a subsequent action involving the same claim" due to the action of issue preclusion as part of res judicata." (Insurer br. 12, citing Aguiar, supra., at 107.)

Issue preclusion requires that an issue of fact be actually litigated in a prior proceeding between the same parties to the current litigation, and a final decision rendered on that issue. LaRoche v. G & F Indus., 27 Mass. Workers Comp. Rep. 51, 53 (2013), citing Martin v. Ring, 401 Mass. 59, 60-61 (1987). The issue of the employee's entitlement to medical treatment had been fully litigated in the 2006 hearing. Thereafter, the decision, issued in 2008, limited the period of that treatment. The question is whether the decision constituted a "final" determination, given that it was under appeal and remained so until August 5, 2010, when the Appeals Court affirmed it. While we have found filing the second claim was without reasonable grounds, the question of finality is likely to arise in other decisions, and, as the insurer has raised it as an issue, we will resolve it.

If the decision was "final" for issue preclusion purposes as soon as it was filed, the employee's claim of 2009 was conclusively barred and there would have been no reasonable ground on which to bring it. If, however, the 2008 decision was not "final" until the Appeals Court's affirmance, issue preclusion would not have barred the claim until the affirmance.

[10] The insurer also asserts that the employee's counsel brought the second claim "for the sole purpose of posturing the matter for a potential attorney's fee." (Insurer br. 11). The judge made no findings on this assertion and we will not speculate on the motives for bringing the claim.

We had occasion to discuss "finality" in Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. 39, 47 (2013), where we found that a final hearing decision foreclosed a subsequent claim raising issues already decided in the prior proceeding. However, in Grant the prior issues were either part of unappealed decisions or had not been raised on appeal. Here, the question is whether the employee is precluded from pursuing her claim for medical benefits, even where the prior decision limiting her entitlement to such benefits was on appeal at the time of the subsequent claim.

In Massachusetts, a decision is "final" for issue preclusion purposes when the parties were fully heard, a reasoned decision was issued, and the decision was either subject to review or was in fact reviewed. Jarosz v. Palmer, 436 Mass. 526, 533-534 (2002). If the prior decision "reached such a stage that a court sees no really good reason for permitting it to be litigated again," it can be considered final. Tausevich v. Board of Appeals of Stoughton, 402 Mass. 146, 149 (1988). This flexible rule, while somewhat different from that in the federal jurisdiction, In Re Belmont Realty Corp., 11 F. 3d 1092, 1095-1096 (1st Cir. 1993)(res judicata effect of a judgment is not destroyed by the pendency of an appeal), and from that in some states, Faison v. Hudson, 243 Va. 413, 419(1992)(in Virginia, a judgment is not final for res judicata purposes during the pendency of an appeal), allows for the imposition of issue preclusion even when an appeal is pending.

In the present case, the issue of the employee's entitlement to medical care had been fully and completely litigated in the 2006 hearing. There being no "really good reason for permitting it to be litigated again," Tausevich, supra., we hold that issue preclusion prevented the employee from litigating another claim for payment of medical bills for that treatment, even while her appeal of the 2008 decision was pending.

The judge apparently predicated his award of § 14 penalties on the determination that the claim, having been barred as a matter of law from the date of its filing, was brought without reasonable grounds. We agree.

The determination whether there has been a violation of § 14(1) requires an analysis of the facts using an objective standard of reasonableness. DiFronzo's Case, 459 Mass. 338, 342 (2011). The inquiry is whether a "cautious and prudent person" would consider the grounds for bringing, prosecuting, or defending the proceeding to be reasonable. Id., citing Gonsalves v. IGS Store Fixtures, Inc., 13 Mass. Workers' Comp. Rep. 21, 24 (1999).

The employee asserts she had reasonable grounds for bringing her claim in 2009 and not in 2006, as the issue of the payment of Dr. Gurbani's treatment in 2006 had not been litigated in the earlier hearing, for she and her counsel had no knowledge that the insurer had rejected payment. (Employee br. 17). She also asserts that under § 16 "decisions regarding . . . need for treatment . . . are never final[,]" (Employee br., 17-18). We have already found these arguments to be without merit.

The employee also argues that she and her counsel were "forced into a hearing in this case" and penalties were assessed "for participating in a proceeding that was completely unnecessary and unsought by employee counsel." (Employee br. 16). She essentially asserts that while she had reasonable grounds to bring her claim in 2009, "forcing" her into a hearing was unreasonable, and should not be the basis of the assessment of § 14(1) penalties. This argument fails to recognize that it was the filing of the second claim which the judge found to be without reasonable grounds, not the holding of the hearing to address the insurer's complaint. (Dec. 13.)

Given that the employee was precluded from filing a valid second §§ 13 and 30 claim as a matter of law, we cannot say the judge erred in finding, objectively, that the employee brought the claim without reasonable grounds. Accordingly, we affirm the judge's finding of a § 14(1) violation against the employee.

Assessment of § 14(1) Penalties Against Employee Counsel

The employee next argues that the assessment of penalties in the amount of a conference and a hearing fee against her counsel was arbitrary, capricious and an abuse of discretion. She argues that because she withdrew her claim more than five days before the scheduled hearing, the "costs" assessed should not include a hearing fee. (Employee br. 18-20.) She analogizes to 452 Code of Mass. Regs. § 1.19(3), which relieves an insurer from having to pay an attorney's fee if it withdraws its appeal of a conference order more than five days before the date set for a hearing.[11]

We do not find the judge's award of a penalty in the amount of a hearing fee to be arbitrary or capricious. The original date set for the hearing on the employee's claim and the insurer's complaint for § 14 penalties was April 23, 2010. It did not take place, however, as the judge allowed the employee's April 22, 2010, motion to continue the hearing, in which the employee noted that a favorable outcome in the then-pending Appeals Court appeal "is requisite in order that the pending litigation proceed." The judge continued the hearing to August 17, 2010.

Even if we were to accept the employee's analogy to § 13A(5) and § 1.19(3), the employee waited until the day before the date of the original hearing to seek a continuance. The insurer had certainly engaged in preparation for the hearing by that date and no doubt incurred expenses in doing so. The fact the employee withdrew her claim eleven days before the rescheduled August 17, 2011, hearing/status conference does not change this fact.

The facts of this case are similar to those in Serafino v. The Republican Co., 23 Mass. Workers' Comp. Rep. 375, 376 (2009), although with a reversal of the parties. The insurer there sought a continuance on the date of the scheduled hearing, in order to follow up on questions it had posed to the impartial physician.

[11] See also G. L. c. 152, § 13A(5).

Despite the fact that all the parties agreed to the continuance, the employee sought a full attorney's fee upon the insurer's withdrawal of its conference appeal, even though the withdrawal took place more than five days before the rescheduled hearing. We held that waiting until the date of the original hearing to seek a continuance, without any effort to contact the employee's counsel, violated G. L. c. 152, § 13A(5), as " '[t]he 'five day' rule would serve little purpose if it did not provide for the reimbursement to an employee's attorney who invests the effort and time required to competently and zealously present the client's claim at hearing.' Darling v. RCB Marion Manor, 9 Mass. Workers' Comp. Rep. 313, 315 (1995)." Serafino, supra. We thus ordered the payment of the requisite fee to the employee's counsel.

The employee in the present case waited until the day before the originally scheduled hearing before seeking a continuance. As in Serafino, the party seeking a late continuance should not be absolved from her delay. We therefore hold that the judge's award of a hearing fee in addition to a conference fee as part of the penalties under § 14(1) was appropriate.

Employee's Entitlement to an Attorney's Fee

Finally, the employee asserts she is entitled to an attorney's fee from the April 11, 2011 hearing, as the insurer's claim for § 14(2) penalties was denied by the judge. We agree. An attorney's fee is due whenever § 14 is raised by an insurer and a judge fails to order a penalty under any of the subsections claimed, Gayle v. NStar Elec. and Gas, 23 Mass. Workers' Comp. Rep. 429, 433 (2009), even when the judge does not comment on the claim, other than to list it as an issue. McGahee v. Milton Bradley, 25 Mass. Workers' Comp. Rep. 329, 331 (2011). We recommit this matter to the administrative judge to determine the amount of such attorney's fee, with the insurer free to argue, as it did in its brief, for a reduction of the fee. (Insurer br. 16.) See G. L. c. 152, § 13A(5)("An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney"). Gayle, supra, at 434.

Because the employee appealed the hearing decision and prevailed in part, an attorney's fee may be appropriate under § 13A(7). If such fee is sought, employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee. No fee shall be due and collected from the employee unless and until that fee agreement is reviewed and approved by this board.

So ordered.

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William C. Harpin
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **December 11, 2014**