COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 007970-05 025798-08**

Larry Washington	Employee
City of Lynn	Employer
City of Lynn	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Horan)

The case was heard by Administrative Judge Heffernan.

APPEARANCES
Robert L. Noa, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Kathleen Garrity McNeill, Esq., for the self-insurer at hearing
Diane J. Bonafede, Esq., for the self-insurer at hearing and on appeal

KOZIOL, J. Having prevailed at the hearing,[1] the employee nevertheless appeals from a decision which limits the amount of his recovery for expenses related to the depositions of his expert witnesses. We vacate the decision insofar as it capped the expenses recoverable to $500 per deposition.

The facts pertinent to the issue before us are as follow. On or about April 8, 2009, the employee underwent a § 11A impartial medical examination. (Dec. 6; Stat. Ex. 1.) The hearing convened on June 1, 2010, and the parties were granted permission to present additional medical evidence. (Dec. 3.) The employee submitted, inter alia, the deposition testimony of Dr. Tobin Gerhart and Dr. Robert R. Pennell.[2] (Dec. 1, 9-11.) In his decision, the judge ordered the self-insurer to

[1] The judge awarded the employee § 34 benefits from August 28, 2008, to date and continuing, medical benefits under §§ 13 and 30, and a § 13A(5) attorney's fee. (Dec. 13-14.)

[2] The judge also ordered the self-insurer to "pay stenographic expenses incurred by the Employee" in connection with the doctors' depositions. (Dec. 14.) The self-insurer did not appeal the decision. Accordingly, there is no dispute concerning the propriety of the stenographic costs awarded, or that the self-insurer is liable to pay at least $500 towards

pay the expenses incurred by the employee in "obtaining" the doctors' depositions but, citing G. L. c. 152, § 9A, the judge further ordered that "in no event shall [the recovery per doctor] exceed $500.00." Id.

The employee argues the judge's award of a maximum recovery of $500 per deposition is arbitrary. We agree, as the decision contains no explanation of how the judge arrived at the $500 figure. The judge may have relied on past department policy setting $500 as a reasonable fee for the depositions of *impartial* physicians,[3] but we have previously rejected this approach in determining the reasonableness of the charges associated with other medical expert witnesses. See Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 236 n.5 (2009)("we decline to adopt the . . . position that the fee approved by the [director] for impartial depositions, currently $500, should be the sole gauge of reasonableness"); see also footnote 3, supra.

However, on this record, medical expert witness fees are not properly recoverable pursuant to G. L. c. 152, § 9A. Section 9A applies in two rare instances: 1) when "a medical question is in dispute . . . and an impartial physician has not, prior to seven days before the date assigned for . . . hearing . . . been appointed by the administrative judge," and 2) "if more than one physician appear[s] and testifie[s] in behalf of the insurer."[4] Neither circumstance is present

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the cost of obtaining each doctor's deposition testimony (as the cost for both depositions exceeded $500). See Employee br. 8, n.3.

[3] The department recently increased this fee to $700 for the first two hours of deposition time. The fee for conducting the deposition of impartial medical examiners is set by contract between those examiners and the department. See Circular Letter 337, issued February 16, 2011.

[4] This section was inserted into the act over eighty years ago, at a time when doctors not only made "house calls," but also testified in person at department hearings. We also note the language of the statute differentiates between insurers' physicians "appear[ing] and testif[ying]," and, in such instance, employees recovering fees associated with physicians "who appeared and testified *or were deposed*" on their behalf. General Laws c. 152, § 9A, as amended by St. 1974, c. 247. (Emphasis added.)

here. The impartial medical examination was scheduled months prior to the hearing, and no physicians appeared to testify at the department on the self-insurer's behalf.

However, medical expert witness fees are recoverable under § 13A(5).[5] That section permits a "prevailing" employee to recover "necessary expenses." Further, 452 Code Mass. Regs. § 1.02, provides, in pertinent part:

> Necessary Expenses as used in [] § 13A, shall mean all *reasonable* out of pocket costs, as the Department may set,[6] to a claimant's attorney incurred by said attorney in prosecuting a claim for benefits or contesting a complaint filed by the insurer, including . . . *expert witness charges*. . . .

(Emphases added.) Here, the amount of necessary expenses was not an issue in controversy at the hearing; consequently, the judge exceeded the scope of his authority by deciding that issue. See Whitaker v. Agar Supply Co., Inc., 14 Mass. Workers' Comp. Rep. 417, 419 (2000)("On the evidence presented, the judge erred by expanding the boundary of the dispute"). Accordingly, we vacate the judge's decision to limit the amount of the reasonable and necessary expenses recoverable for the deposition testimony of Doctors Gerhart and Pennell under § 13A(5). See Linthicum v. Archambault, 379 Mass. 381, 389-390 (1979) (discussing factors to consider in determining reasonableness of costs incurred).

So ordered.

Catherine Watson Koziol
Administrative Law Judge

[5] General Laws c. 152, § 13A(5), provides, in pertinent part:

> Whenever an insurer . . . contests a claim for benefits and . . . the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney . . . plus necessary expenses.

[6] We are unaware of any attempt by the department to set limits on the amount of costs recoverable under § 13A for expenses related to the testimony of medical expert witnesses who are not § 11A impartial medical examiners.

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Bernard W. Fabricant
Administrative Law Judge

HORAN, J., **(concurring in part and dissenting in part).** I agree with the majority that the judge erred by capping the amount of the deposition expenses recoverable.[7] Because the employee was required to appeal in order to vacate that part of the decision, and in the interest of judicial economy, I would recommit the case to the judge for a determination of the amount of the reasonable expenses recoverable. Requiring the employee to file another claim, and obligating the insurer to pay another referral fee,[8] to return this matter to the judge for a conference is a remedy which neither party deserves. Nor is it, under these unique circumstances, required by law. We have the discretion to recommit cases for

[7] Judges are free, of course, to invite the submission of evidence respecting the amount of the employee's expenses incurred prior to the close of the evidence. Hopefully, the parties would agree to allow affidavits to be used for this purpose. See General Laws c. 152, § 11B ("Procedures within the division of dispute resolution shall be as simple and summary as reasonable"). In this way, insurers have the opportunity to register any objection(s) respecting such evidence, and judges have the evidentiary basis upon which to make findings on the amount due should the employee prevail. In the event a judge chooses instead to simply award the employee "the recovery of [his] reasonable and necessary expenses," we note that board practice permits the filing of a claim, under § 13A(1-6), to determine the amount of the expenses properly recoverable. See 452 Code Mass. Regs. § 1.07(2)(d), which provides, in pertinent part:

> Where necessary expenses have not been paid, a memorandum shall also outline the nature and amount of the expenses and be accompanied by receipts or proof of expenditures. Each claim shall be accompanied by an affidavit signed by the attorney attesting that . . . necessary expenses are owed and unpaid and that 14 days have passed since [notice via certified mail to the insurer] was received.

[8] See General Laws c. 152, § 10(5), which provides, in pertinent part:

> In each instance in which a claim for compensation is referred to the industrial accident board, the insurer shall pay a fee of sixty-five percent of the average weekly wage in the commonwealth at that time. . . .

further findings "when appropriate." G. L. c. 152, § 11C. And in multiple instances we have permitted judges to accept new evidence on recommittal to resolve residual issues. E.g., Hogan v. William Mascioli d/b/a Add-A-Room, 25 Mass. Workers' Comp. Rep. 139 (2011); O'Sullivan v. Certainteed Corp., 18 Mass. Workers' Comp. Rep. 16 (2004). Because it was the judge, and not the parties, who erred, recommittal is the more sensible disposition.

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Mark D. Horan
Administrative Law Judge

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