COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 048082-03**

Magnolia Rivera	Employee
AJ Wright	Employer
American Casualty of Reading PA	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Brendemuehl.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Herbert C. Dike, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision awarding the insurer a § 14(1) penalty.[1] We affirm.

The original September 28, 2006 hearing decision established liability for a low back injury and ordered a closed period of §35 benefits. However, the judge also adopted the §11A examiner's opinion that, as of September 13, 2005, there was no longer any causally related disability. (Dec. 4.)

The employee subsequently filed a new claim for §36(1)(j) benefits. The Form 140 Temporary Conference Memorandum submitted to the judge was executed by counsel for both the employee and the insurer, indicating the necessity of a medical examination, and specifically requesting that an orthopedic

[1] General Laws c. 152 § 14(1), provides, in relevant part:

> 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.

specialist be assigned as the impartial physician.[2] In the October 10, 2008 conference order, the judge denied the claim. The employee filed a timely notice of appeal[3] which indicated, contrary to her representation at conference, that both parties "opted out" of the required § 11A impartial examination.[4] (Dec. 5.) The

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[2] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass Workers' Comp. Rep. 160, 161 n.3 (2002).

[3] 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. The insurer or any claimant represented by counsel who files such appeal shall also submit a fee equal to the average weekly wage in the commonwealth at the time of the appeal to defray the cost of the medical examination under this section within ten days of filing said appeal. . .

[4] 452 Code Mass. Regs. § 1.02 provides, in relevant part:

> Disputes Over Medical Issues as used in M.G.L. c. 152, § 11A(2), shall not include any case in which:
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> . . .
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> (c) the parties agree upon both the nature of the impairment and the causal relationship between the impairment and the employment; provided, however, that the parties agree that no impartial physician's report is required.
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> (d) based upon the information submitted at a Conference pursuant to M.G.L. c. 152, § 10A, the administrative judge determines that there is no dispute over medical issues. The judge's determination, and reasons therefor, shall be stated in the M.G.L. c. 152, § 10 Conference order.

Moreover, 452 Code Mass. Regs. § 1.10, also references the need for the opt-out determination to be made in the conference order itself:

> (9) No impartial physician shall be required where an administrative judge has determined, based upon the information submitted at the M.G.L. c. 152 § 10A conference, that there is no dispute over medical issues and has so stated in the M.G.L. c. 152, § 10A conference order.

insurer objected, asserting the case contained a disputed medical issue. (Ex. 7.) The employee responded by filing a motion on October 20, 2008, requesting to opt out of the §11A examination. (Ex. 8.) Following the denial of that motion, the employee informed the judge that she would not pay for an impartial examination, requesting instead that the claim be dismissed so an appeal to the reviewing board could be filed. (Dec. 5-6; Ex. 9.)

A subsequent request to the senior judge on September 22, 2009, yielded similar results; an appeal fee was still required to pay for the impartial examination. (Ex. 10.) When no fee was forthcoming, the matter was administratively withdrawn. (Dec. 6.) In a letter dated June 17, 2010, the employee presented her objections to the Commissioner (now Director), and, once again, was informed that the case involved medical issues, an appeal fee was due, the failure to pay the fee resulted in the administrative withdrawal of the claim, and therefore, "the administrative withdrawal shall stand." Rizzo, supra ; Ex. 13.

More than a year later, on August 3, 2011, the employee re-filed the same claim for §36 benefits. Rizzo, supra. In response, the insurer joined a claim against the employee's counsel for §14(1) penalties. The §36 claim was again denied at conference,[5] and the insurer's §14(1) claim was reserved for hearing. The employee appealed the conference order, but once again refused to pay the appeal fee. The employee also filed a motion to "opt out" of the impartial examination, which was denied. (Dec. 6-7.)

The insurer was granted a late appeal on the denial of the §14(1) claim. (Dec. 7; Ex. 20.) The case went forward only on the insurer's § 14(1) claim for penalties because "[t]he employee did not perfect her appeal on the Section 36 claim by filing the requisite fee for the impartial examination, after the Court [sic]

[5] The November 21, 2011 conference order denying the § 36 claim specified: "I find that there exists a medical issue in dispute and that there will be a Section 11A examination." (Dec. 7; Ex. 15).

had deemed there to be a medical issue in dispute on numerous occasions." (Dec. 7.) The resulting April 30, 2012 hearing decision found the employee's counsel violated § 14(1) and ordered payment of costs in the amount of $6,150.00. (Dec. 10.)

The employee argues the judge erred in assessing a § 14(1) penalty, asserting that she has a right to pursue her claim for § 36 (1)(j) benefits.[6] We disagree. There is no need to address any of the employee's proffered theories regarding her § 36 claim, as she clearly did not preserve her right to a hearing. Because the employee's first request to "opt out" of the impartial examination was made after the filing of the conference order, it was untimely. Pursuant to 452 Code Mass. Regs § 1.02 and § 1.10 (9), the judge has discretion to allow the parties to forego the impartial examination, but this must be clearly articulated in the conference order. We find no abuse of discretion in the denial of the employee's late request. "The employee's failure to pay the §11A fee, or in the alternative, to seek a waiver[7] of the fee resulted in an unperfected appeal." Rancourt v. AC and S, Inc., 16 Mass. Workers' Comp. Rep. 149, 150 (2002). See Kowalczyk v. Morgan Constr. Co., 13 Mass.Workers' Comp. Rep. 284, 285 (1999). This case is governed by our decisions in Ellingwood v. CLP Resources, Inc., 26 Mass. Workers' Comp. Rep. 89 (2012)(parties bound by representation

[6] General Laws c. 152, §36(1), provides:

> (j) For each loss of bodily function or sense, other than those specified in preceding paragraphs of this section, the amount which, according to the determination of the member or reviewing board, is a proper and equitable compensation, not to exceed the average weekly wage in the commonwealth at the date of injury multiplied by thirty-two; provided, however, that the total amount payable under this paragraph shall not exceed the average weekly wage in the commonwealth at the date of injury multiplied by eighty.

[7] The employee's October 20, 2008 motion, and subsequent appeal thereof, did not seek a waiver of the fee based on indigence, pursuant to 452 Code Mass. Regs. § 1.11(1)(a). Instead, that motion requested that the employee be allowed to "opt out" of the required impartial physician examination entirely. Because that request was denied, the payment of a fee was required. G. L. c. 152 § 11A.

made in Form 140 conference memorandum), and Giraldo v. Alpert's, Inc., 27 Mass. Workers' Comp. Rep. 115 (2013)(administrative withdrawal after failure to perfect appeal bars re-litigation). Despite the fact that the same claim had been denied a year earlier, the employee's counsel insisted upon proceeding with the second claim without any reasonable grounds to do so. See Giraldo, supra. The judge's assessment of costs was thus appropriate pursuant to §14(1). Adam vs. Harvard Univ., 24 Mass. Workers' Comp. Rep. 193 (2010); see Gonsalves v. IGS Store Fixtures, Inc., 13 Mass. Workers' Comp. Rep. 21 (1999).

The decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **September 24, 2014**