COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 004308-04

Nancy Packard	Employee
Swix Sport USA, Inc.	Employer
Chubb Group Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and Fabricant)

APPEARANCES

Teresa Brooks Benoit, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., and Charles E. Berg, Esq., for Ellis & Associates on appeal
Nancy Packard, pro se, on appeal
Shawn F. Mullen, Esq., for the insurer

HORAN, J. This is an appeal by the employee's former counsel, Ellis & Associates (hereinafter the appellants), seeking reversal of an administrative judge's decision denying its claim for attorney's fees and expenses, and assessing costs against it pursuant to G. L. c. 152, § 14(1). Finding no error, we affirm the decision; we also refer the matter to the Senior Judge. See G. L. c. 152, § 7C.[1]

The employee suffered a work-related injury to her right arm on February 6, 2004. She subsequently filed a § 36 claim for disfigurement and loss of function benefits. Following a § 10A conference, the insurer was ordered to pay the employee $1,768.92 for scarring and disfigurement under § 36(k), and $4,183.50 for permanent loss of function to her right arm under §§ 36(e) and (i), based on an eleven percent impairment rating. The employee appealed.

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[1] General Laws c. 152, § 7C, provides, in pertinent part:

> The senior judge may, for cause, deny or suspend the right of any person to practice or appear before the department.

Prior to the hearing, Dr. Robert Leffert was appointed as the § 11A impartial medical examiner. In his report of March 30, 2006, Dr. Leffert opined the employee, as a result of her industrial accident, suffered a fifteen percent permanent loss of function to her right arm. This assessment produced, under §§ 36(e) and (i), a benefit award of $1,521.27 more than the insurer had paid pursuant to the conference order.

On May 2, 2006, via letter to the appellants, the insurer offered to pay the employee an additional $1,521.27, based on the fifteen percent loss of function assessment of Dr. Leffert. (Dec. 657-659.) The appellants do not dispute that the insurer's offer conforms to the requirements of 452 Code Mass. Regs. § 1.19(3), which provides, in pertinent part:

> When an insurer . . . at least five days before a hearing, serves on a claimant or person receiving compensation or the representative of such claimant or person a written offer to pay . . . compensation under M.G.L. c. 152, §§ 30 or 36, and such offer is not accepted, the insurer shall not be required to pay any fee under M.G.L. c. 152, § 13A, for such . . . hearing, unless the . . . decision rendered directs a payment of . . . [§ 36] compensation in excess of that offered.

The insurer received no response to its offer, and the case proceeded to hearing.[2]

On October 2, 2006, the parties appeared at the hearing. Dr. Leffert's § 11A report was the only medical evidence *sub judice*. Neither party requested the opportunity to depose Dr. Leffert, nor did they move for leave to submit additional medical evidence. At hearing, employee's counsel stated the pending claim was for *additional* § 36 benefits based on the fifteen percent loss of function assessment of Dr. Leffert − which was precisely what the insurer had offered to pay five months earlier.[3]

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[2] All references to the transcript in this decision are to the hearing testimony taken on October 2, 2006.

[3] The insurer's medical expert, Dr. Edward Nalebuff, opined the employee suffered from an eleven percent loss of function to her right arm. Dr. Roland Caron estimated the employee's loss of right arm function at thirty-eight percent. (Dec. 585; Ex. 3.) At the October 2, 2006 hearing, attorney Teresa Brooks Benoit, employee's counsel, considered moving to submit additional medical evidence, but did not do so. (Tr. 18-19.) This election, combined with the lack of an attempt to alter the opinion of Dr. Leffert via deposition, left the judge with no alternative but to award loss of function benefits based on Dr. Leffert's fifteen percent assessment. (Tr. 16-20.) Consequently, the employee,

Employee's counsel also claimed attorney's fees, and reimbursement of its expenses. (Dec. 657, 660.) The employee first testified she had not accepted the insurer's offer because it did not include an offer to pay her attorney's expenses, which had been passed on to her. (Tr. 37, 42.) However, she later testified that her attorneys had not conveyed the insurer's offer to her until the day of the hearing. (Dec. 660; Tr. 48-50.)

On October 25, 2006, the judge issued a preliminary hearing decision, directing payment of the additional $1,521.27 loss of function benefits claimed by the employee, with § 50 interest to be paid by the insurer (it subsequently paid $74.19 in interest). (Dec. 658, 669.) The judge found the insurer's offer to pay the additional $1,521.27 in § 36 benefits had been received by the appellants on May 5, 2006, but had not been communicated to the employee prior to the October 2, 2006 hearing. (Dec. 660, 662.) In fact, the appellants had not deigned to respond to the insurer's offer until September 29, 2006. (Dec. 662, 668.) Because his award of additional benefits matched the amount that had been offered by the insurer in May 2006, the judge, relying on the aforementioned rule 1.19(3), refused to award the appellants attorneys fees and reimbursement of their expenses. (Dec. 664.)

The judge further found that, by failing to promptly communicate the rule 1.19(3) offer to the employee, the appellant failed to comply with Rule 1.4 of the Massachusetts Rules of Professional Conduct.[4] The judge deemed the appellants' actions "indefensible," noting

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from an evidentiary standpoint, could not hope to receive an award in excess of the amount contained in the insurer's § 1.19(3) offer to pay.

[4] Mass. R. Prof. C. 1.4, provides:

- A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

they failed to respond to the insurer's offer to pay for five months, and then insisted the case proceed to hearing "despite the insurer's offer to pay everything the employee reasonably claimed. . . ." (Dec. 665.) The judge concluded "that the only rationale for the employee's attorneys' behavior was their quest for a fee. . . ." (Dec. 662.) The judge found the appellants violated § 14(1)[5] by advancing a frivolous claim, and assessed the whole cost of the proceedings against the appellants. (Dec. 665-666.) He ordered the parties to appear before him on November 20, 2006, to determine those costs and, following a presentation by the insurer, issued a "Corrected Decision."[6] (Dec. 658-659) The judge determined the "whole cost of the proceeding" to be $3,661.69.[7] (Dec. 667.) This amount

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The judge further cited Comment [1] of Rule 1.4, as directly on point:

> The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, *inform the client of communications from another party* and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. *A lawyer who receives from opposing counsel an offer of settlement* in a civil controversy or a proffered plea bargain in a criminal case *should promptly inform the client of its substance* unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). *Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter*.

(Dec. 663, quoting Rule 1.4, Comment [1], Massachusetts Rules of Professional Conduct, supra.) (Emphasis in decision.)

[5] General Laws c. 152, § 14(1), provides, in pertinent 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.

[6] Because the only difference between the "Preliminary Decision" and the "Corrected Decision" issued November 22, 2006 was the determination of the "whole cost of the proceedings," all references herein are to the Corrected Decision.

[7] Appellants advance no challenge to the method used by the judge to arrive at the amount of the costs assessed; they only contend the judge erred by concluding their pursuit of the claim at hearing constituted a violation of § 14(1).

included the expenses incurred by the insurer for its attorney's time, ($3,587.50), as well as interest due to the employee (from the date the insurer's offer was received to the date of payment for the loss of use of the $1,521.27 awarded) in the amount of $74.19. (Dec. 669.) The judge ordered the appellants to reimburse the insurer for the $74.19 in interest it had paid. (Dec. 669.) Thus, the judge made the appellants ultimately liable for the § 50 interest payable to the employee.

The appellants raise two issues on appeal.[8] First, they maintain the judge erred "by not awarding the Employee's attorney a fee, despite the Employee being awarded above and beyond what was offered by the Insurer in their Offer to Pay." (Appellants' br. 4, 6.) Second, the appellants challenge the judge's finding that they violated § 14(1). We agree with the insurer, and the employee, that the judge's decision is not "beyond the scope of his authority, arbitrary or capricious, or contrary to law." G. L. c. 152, § 11C.

The appellants first argue entitlement to an attorney's fee and expenses because the employee "prevailed" at hearing within the meaning of § 13A(5).[9] They posit that the

[8] The appellants filed an appeal of the hearing decision, ostensibly on behalf of the employee. At the pre-transcript conference held to discuss the issues and to arrange a schedule for the filing of briefs, it was revealed that the appellants desired to appeal *only* the judge's failure to award attorneys fees and costs, and the imposition of § 14(1) penalties, including that portion mandating payment of interest to, in effect, their own client. The presiding administrative law judge questioned whether the interests of the employee's attorney were at odds with the employee's financial interest. See Massachusetts Rule of Professional Conduct 1.7(b). Thereafter, the appellant filed a motion to withdraw as employee's counsel, which was granted following a hearing which the employee was invited to attend. (See Ruling on Motion to Withdraw as Counsel, March 29, 2007.) Ellis & Associates thus became the appellants. Rather than retain new counsel, the employee joined with the insurer to request that the decision of the administrative judge be affirmed. (See Ins. br. 12.)

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

> Whenever an insurer . . . contests a claim for benefits and then either (i) accepts the employee's claim or withdraws its own complaint within five days of the date set for hearing pursuant to section eleven; or (ii) the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney . . . plus necessary expenses.

employee succeeded on a "significant litigation issue," to wit, the award of § 36 benefits and interest. See Connolly's Case, 41 Mass. App. Ct. 35, 38 (1996). The appellants do not dispute the judge's finding that, five months before hearing, the insurer offered to pay the employee the difference between her previous loss of function award at conference, and the amount she claimed at hearing. (Appellants' br. 4.) However, the appellants claim the award of interest in the hearing decision constitutes an award of "compensation in excess of that offered" by the insurer in its offer to pay. See 452 Code Mass. Regs. § 1.19(3), infra.

We disagree. Interest is not "compensation" as defined in chapter 152. See Murphy's Case, 352 Mass. 233, 235 (1967)(interest not part of the "compensation payable to an injured employee" under the statute); Russo's Case, 46 Mass. App. Ct. 923 (1999)(same); Sylva v. Burger King Corp., 6 Mass. Workers' Comp. Rep. 272, 273 n.3 (1992)(attorney's fees, interest and cost of living adjustments have not been characterized as compensation). Accordingly, the employee did not "prevail" at hearing, and no attorney's fee is due. Moreover, as "necessary expenses" are awarded only in conjunction with attorney's fees, no expenses are due, because no fee is due.[10] See § 13A(1-6).

Even if, *arguendo*, interest were compensation, the judge specifically found the appellants' behavior deprived the employee the use of her money from May 5, 2006, to the date of the hearing decision. (Dec. 666.) The judge ordered the insurer to pay interest, but rightfully ordered the appellants to reimburse the insurer for its payment of same. (Dec. 669.) Again, the *appellants*, and not the insurer, delayed the employee's receipt and use of the additional amount due under § 36. On these facts, the appellants' insistence upon entitlement to attorney's fees and expenses is ludicrous. Accordingly, the appellants' contention that the judge erred by ordering a § 14(1) penalty must fail.[11]

[10] At hearing, the employee filed a motion to join a claim for a § 8(1) penalty for the insurer's failure to pay interest pursuant to the conference order. (Tr. 13-16.) The judge denied the motion on the grounds it had not been properly filed. Thus, the issue of whether or not interest was timely paid on the conference award was not addressed in the hearing decision. The appellants claim no error respecting the judge's disallowance of their motion to join a claim for a § 8(1) penalty.

[11] Section 14(1) costs are appropriate when a claim is advanced "without reasonable grounds." The judge assessed costs because he found the appellant's actions were "frivolous." (Dec. 665.) If appellants' actions in pursuing this case to hearing were

On these peculiar and undisputed facts as found, we consider the appellants' pursuit of this appeal was also undertaken without reasonable grounds. Accordingly, we affirm the judge's decision in its entirety, and order the appellants to pay the whole cost of this appeal pursuant to § 14(1). Within twenty days of the filing date of this decision, counsel for the insurer may submit to this panel, and serve upon the appellants, an affidavit of the costs incurred in defense of this appeal. The appellants shall then have twenty days to respond in writing. We retain jurisdiction of the case for the sole purpose of determining the supplementary amount due the insurer under § 14(1).

Lastly, we refer this decision to the senior judge for whatever action, pursuant to G.L. c. 152, § 7C, she deems appropriate. See Cotter v. Hawkeye Constr. Co., 22 Mass. Workers' Comp. Rep. 149 (2008); Ferreira v. Forrest Homes of Massachusetts, 22 Workers' Comp. Rep. 125 (2008).

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **November 18, 2008**

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frivolous, *a fortiori*, they were undertaken "without reasonable grounds." See footnote 2, supra.