

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 021535-04

Paul DaSilva (deceased)
Palladino Landscaping
Savers Property and Casualty Ins. Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Costigan,¹ Horan and Koziol)

The case was heard by Administrative Judge Chadinha.

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing and on brief
James N. Ellis, Esq., for the employee at hearing and on appeal
James Riley Hodder, Esq., for the employee on appeal
Teresa Brooks Benoit, Esq., for the employee at oral argument
Joanne T. Gray, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on brief and at oral argument

COSTIGAN, J. By decision filed on October 29, 2008, the administrative judge awarded § 36 specific compensation benefits, but denied and dismissed the employee's claim for § 8(5)² penalties for the insurer's alleged illegal terminations of weekly benefits. By D.I.A. Form 112 received on November 14, 2008, Attorney James N. Ellis purported to file an appeal from that decision on behalf of the employee.³ The employee, however, had died some fourteen months prior, and

¹ The panel was originally comprised of Administrative Law Judges McCarthy, Horan and Koziol. When Judge McCarthy was appointed Senior Judge, Administrative Law Judge Costigan replaced him on the panel.

² General Laws c. 152, § 8(5), provides, in pertinent part:

[If] the insurer terminates, reduces, or fails to make any payments required under this chapter, and additional compensation is later ordered, the employee shall be paid by the insurer a penalty payment equal to twenty per cent of the additional compensation due on the date of such filing.

³ In fact, on the appeal form, the employee was parenthetically noted as deceased.

counsel no longer had a client. We need not address the merits of the arguments advanced. For the reasons that follow, we reverse the decision, vacate its awards and dismiss the appeal for lack of standing.

By way of background, on July 16, 2004, the employee sustained a severe injury to the fifth finger of his right, dominant hand while using a hedge trimmer in the course of his employment. The insurer accepted liability and paid the employee weekly § 34 total incapacity benefits until August 13, 2005, when it suspended payments because the employee failed to appear for a § 45⁴ medical examination.

On or about November 22, 2005, the employee filed a claim alleging the insurer's suspension of weekly compensation was illegal and seeking a § 8(5) penalty. The insurer denied the penalty claim but, prior to conference, reinstated the employee's weekly benefits for the six-month period of suspension. Following a § 10A conference in February, 2006, the administrative judge denied the penalty claim, and the employee appealed. Subsequently, following a guilty finding to a misdemeanor and/or felony, the employee was incarcerated from October 4, 2006 to December 2, 2006. The insurer once again suspended weekly benefits, this time pursuant to G. L. c. 152, § 8(2)(j).⁵ On February 15, 2007, the insurer reinstated

⁴ General Laws c. 152, § 45, provides, in pertinent part:

After an employee has received an injury, and from time to time thereafter during the continuance of his disability he shall, if requested by the insurer or insured, submit to an examination by a registered physician, furnished and paid for by the insurer or the insured. . . . If the employee refuses to submit to the examination or in any way obstructs it, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.

⁵ General Laws c. 152, § 8(2), provides, in pertinent part, that "an insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:

- (j) the employee has been incarcerated pursuant to a conviction for a felony or misdemeanor and has thereby forfeited any right to compensation during such period. . . .

payment of § 34 benefits retroactive to December 2, 2006; those benefits expired on July 16, 2007. The employee died on September 4, 2007. (Employee br. 3; Ins. br. 4.)

After multiple continuances,⁶ an evidentiary hearing was held on May 13, 2008. "The employee" was allowed to join a claim for permanent loss of bodily function and disfigurement benefits under § 36 and additional § 8 penalties relating to the insurer's second suspension of weekly benefits. A claim for reimbursement of \$411.24 in costs incurred in appointing an administratrix of the employee's estate, was voluntarily paid by the insurer pursuant to § 39, before the hearing. (Dec. 3, fn.1.) The parties agreed to stipulate to certain facts, and to submit on written closing arguments. The judge adopted the stipulations as findings of fact. (Dec. 2.) Nevertheless, both the record and the judge's decision reflect the § 36 claim and the § 8(5) penalty claims were prosecuted in the name of the employee, as was the § 11C appeal to this board.⁷

⁶ By letter dated April 16, 2008, Attorney Charles E. Berg notified the judge and insurer's counsel that the employee's estate had been probated and "this matter should be marked up for hearing on the employee's claims for specific compensation and for Section 8 penalties." Enclosed with the letter was a copy of the November 6, 2007 Bristol County Probate and Family Court Department's appointment of Ana Mello as administratrix of her late brother's estate. The same form listed Chad Paul DaSilva, the employee's then nineteen year-old son, as his heir at law or next of kin. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of contents of board file permissible). Neither then nor since, however, has any attorney filed a notice of appearance on behalf of Ms. Mello, either as the administratrix of the employee's estate or as his surviving sister, or on behalf of the employee's surviving son. See footnote 8, infra.

⁷ The judge ordered the insurer to pay *the employee's estate* a total of \$5,218.32 in § 36 benefits, (Dec. 4), notwithstanding that the estate was not a party to the litigation, and § 36A provides for payment to the employee's dependents or surviving family members, not to the estate. See footnote 8, infra. Although he found the insurer's first suspension of weekly benefits was illegal, the judge determined no penalty was due under § 8(5) because no "additional compensation" had been ordered. (Dec. 7.) Indeed, no additional compensation was ever claimed by the employee or his legal representative. Lastly, finding the insurer's second suspension of benefits, during the employee's incarceration, was proper, and its resumption of payment was timely and reasonable under the circumstances, the judge denied that § 8(5) penalty claim. (Dec. 7-8.)

The reviewing board heard oral arguments on January 5, 2010. The panel asked Attorney Teresa Brooks Benoit whether she had filed an appearance on behalf of the employee's estate. She replied she had not. Insurer's counsel advised the panel he did not challenge the deceased employee's standing to prosecute the appeal. The insurer's acquiescence, however, does not prevent us from addressing it. Choquette v. Matson Community Svcs., 23 Mass. Workers' Comp. Rep. 1, 3 (2009), citing Williams v. Attleboro Mutual Fire Ins. Co., 31 Mass. App. Ct. 521 (1991). Standing is treated as an issue of subject matter jurisdiction. Rodriguez v. Carilorz Corp., 23 Mass. Workers' Comp. Rep. 89, 93 (2009), citing Boston v. Rochalska, 72 Mass. App. Ct. 236, 240 n.9 (2008).

As such, it cannot be waived by the parties . . . and must be decided, regardless of the point at which it is first raised, even after adjudication and on appeal. Litton Business Sys., Inc. v. Commissioner of Revenue, 383 Mass. 619, 622 (1981); Boston v. Massachusetts Port Auth., 364 Mass. 639, 645 (1974); see also The Locator Services Group, Ltd. v. Treasurer and Receiver General, 443 Mass. 837, 846 n.12 (2005)(court addressed jurisdictional issue of standing even though treasurer no longer disputed plaintiff's standing).

Rodriguez, *supra* at 93-94. Thus, even where the parties are silent, courts must consider the issue of subject matter jurisdiction *sua sponte*. Patry v. Liberty Mobilehome Sales, Inc., 15 Mass. App. Ct. 701 (1983), *aff'd* 394 Mass. 270 (1985).

It is well-established that if a claim for compensation is pending when the employee dies, the legal representative must be substituted for the employee in the pending proceeding. Steuterman's Case, 323 Mass. 454 (1948). The legal representative may choose to retain the same attorney who represented the employee, or opt for different representation. In either case, counsel must file a notice of appearance on behalf of the new claimant.

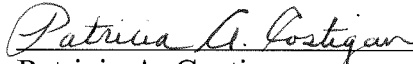
At the conclusion of oral argument, the panel instructed Attorney Benoit to file an appearance, at least on behalf of the employee's estate. Counsel did not contend such an appearance was unnecessary, and she promised to file one forthwith. By D.I.A. Form 114 dated January 6, 2010, Attorney Benoit filed her appearance on


*behalf of the employee.*⁸ To date, no one has filed an appearance on behalf of the administratrix of the deceased employee's estate, his dependents, surviving issue, surviving parents, and/or surviving brothers and sisters,⁹ the only potential parties in interest in the claims for § 8(5) penalties and § 36A specific compensation.


"Generally, one 'who lacks individual standing may not assert the right of others not before the [tribunal].'" Rodriguez, supra at 94, quoting Klein v. Catalano, 386 Mass. 701, 714 (1982).

Accordingly, because the judge lacked subject matter jurisdiction, we reverse his decision and vacate the awards of § 36 benefits and attorney's fees. For the same reason, we dismiss the appeal of that decision.

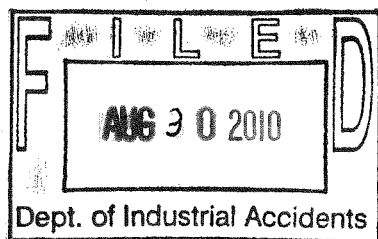
So ordered.


Patricia A. Costigan
Administrative Law Judge


Mark D. Horan
Administrative Law Judge


Catherine W. Koziol
Administrative Law Judge

Filed:



⁸ Inexplicably, this appearance did not even indicate the employee was deceased.

⁹ Upon his death, the employee's initial claim for a § 8(5) penalty for the insurer's alleged illegal termination of weekly incapacity benefits became an asset of his estate, and his claim for § 36 benefits for permanent loss of bodily function and disfigurement became governed by the provisions of § 36A, which state, in pertinent part:

In the event an injured employee who has become entitled to compensation under section thirty-six dies before fully collecting the said compensation, the balance remaining shall become due and payable in a lump sum to his dependents, or if none, to his surviving issue, or if no surviving issue, then to surviving parents, or if no surviving parents then to surviving brothers and sisters. . . .