COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 026203-04

Employee: Pedro Ferreira
Employer: Forrest Homes of Massachusetts
Insurer: Granite State Insurance Co.

REVIEWING BOARD DECISION

(Judges Horan, Costigan and Fabricant)

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing and on appeal
James N. Ellis, Esq., for the employee on appeal
Diane Cole Lane, Esq., for the insurer

HORAN, J. The employee appeals from a decision denying and dismissing his claim,[1] with prejudice, due to his failure, and that of his attorneys, to appear on the date set for the § 11 hearing. The employee argues the judge abused his discretion by refusing to grant his request for a further continuance of the hearing. The employee also argues he was entitled to prevail even without an evidentiary hearing because the § 11A impartial medical examiner's report supported his claim. We reject both arguments. We also find that the employee's attorneys have brought this appeal without reasonable grounds, and retain jurisdiction for future assessment of "the whole costs of the proceedings" against the employee's attorneys pursuant to § 14(1).[2]

---

[1] The employee's claim was for a psychiatric injury alleged to be a sequela of a work-related back injury for which the insurer had accepted liability.

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

> If any . . . administrative law judge determines that any proceedings have
>
> been brought . . . by an employee or counsel without reasonable grounds,

On August 3, 2004, the employee suffered an industrial injury to his back. After the insurer accepted the case, the employee claimed a psychiatric injury as a sequela to his back injury. When a dispute arose regarding the amount of any attorney's fee due (in light of the insurer's offer to accept the psychiatric injury claim more than five days before the original hearing date of September 8, 2006),[3] the judge rescheduled the hearing, with the agreement of both parties, to the morning of September 20, 2006, in Lawrence. (Dec. 546-550.)

Shortly after 3:30 p.m. on the day before the rescheduled hearing, attorney Charles Berg faxed a letter to the judge at his Lawrence office. The letter stated:

> "I am writing to request that the hearing before you on the above noted matter, scheduled for 9/20/06, be rescheduled. My office has been in contact with the insurer's counsel, Diane Cole Laine, who has agreed to reschedule the hearing, *if you allow it*. Your consideration of this matter is greatly appreciated."

(Dec. 550; emphasis added.) The judge did not see the faxed letter until the following morning, September 20, 2006. Id. That morning, insurer's counsel appeared before the judge at the appointed time; neither the employee, nor his attorneys, appeared. (Dec. 546,

---

> the whole cost of the proceedings shall be assessed against
>
> the employee or counsel, whomever is responsible.

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

> Whenever an insurer . . . contests a claim for benefits and then . . . (i)
>
> accepts the employee's claim . . . *within five days of the date set for hearing*
>
> pursuant to section eleven . . . the insurer shall pay a fee to the employee's
>
> attorney . . . plus necessary expenses.
>
> (Emphasis added.) See also 452 Code Mass. Regs. § 1.19(3). The judge expressly found the insurer's offer to pay the claim "was dated August 29, 2006, some eleven days prior to the date of the hearing." (Dec. 547.)

551.) The employee's absence was at the direction of his counsel.[4] What followed was a day of telephone calls and faxed messages between the judge's office and the office of employee's counsel. Suffice it to say that the employee's attorneys had other scheduled assignments that day - a morning deposition, and afternoon conferences in Boston.[5] On the morning of September 20, 2006, the judge directed insurer's counsel to contact attorney Berg to tell him that his motion was denied, and that the case would be heard at 1:00 p.m. that afternoon. (Dec. 522.) The judge also contacted the Ellis law firm and left the same message. Id. Around 12:30 p.m. that afternoon, a letter signed by attorney Berg was faxed to the judge. Id. The letter stated, in pertinent part:

> "At noon today a call was relayed to me en route to Boston where
>
> I have four conferences". . . . "When you finally deigned to respond
>
> to our attempts at contacting your office to reschedule, I was not
>
> in a position to be in two places simultaneously."

Id. When the day passed without the employee, or his attorneys, appearing, the judge denied and dismissed the claim. [6] (Dec. 552-553.)

---

[4] Attorney Berg conceded this point at oral argument. Attorney James Ellis, who signed the employee's appellate brief, was also provided with separate notice of the oral argument, but did not appear.

[5] At oral argument, attorney Berg conceded his office would have known, weeks in advance, about the scheduling conflict between the hearing, the deposition, and the Boston conferences. Other than his eleventh hour request to continue the matter, his office made no effort to have attorney Ellis, who was also counsel of record, or another attorney cover the Lawrence hearing set for September 20, 2006. Attorney Berg also conceded he did not receive a response to his motion to continue from the judge prior to September 20, 2006, and did not attempt to contact the judge on that morning to determine if the judge had seen, let alone acted upon, his motion.

[6] In his decision, the judge included counsel's afternoon response to the judge's denial of the continuance as an exhibit. (Ex. 7.) Noteworthy is the lack of any facts to support a

The question of whether the judge's denial of the purported motion for a continuance was an abuse of discretion, and therefore arbitrary or capricious under § 11C, is easily answered. See Care and Protection of Georgette, 54 Mass. App. Ct. 778, 787 (2002)(abuse of discretion in courts assessed under similar "arbitrary or capricious" standard). The judge did not abuse his discretion. The employee's attorneys never proffered a single reason in support of their eleventh-hour request for a continuance. That communication can only be viewed as a demand, rather than a request, for the hearing to be rescheduled. The decision was for the judge − not employee's counsel − to make. "The member conducting the hearing may grant a continuance only for reasons beyond the control of a party or his attorney." G. L. c. 152, § 11. Because employee's counsel, in the letter faxed to the judge, failed to articulate a reasonable basis in support of his continuance request, his appeal to this board also lacks "reasonable grounds." See footnote 1, supra. The denial and dismissal of the claim with prejudice was not beyond the scope of the judge's authority, arbitrary or capricious, or contrary to law.[7] G. L. c. 152, § 11C.

The employee's second appellate argument - that there was no need to hold the hearing due to the apparently favorable medical report of the § 11A impartial medical examiner -

---

showing of "excusable neglect" to warrant reversal of the judge's action. (Dec. 552-553.) See Eyal Reporting Serv. v. Gouin, 2006 Mass. App. Div. 99, citing Berube v. McKisson Wine & Spirits Co., 7 Mass. App. Ct. 426, 431 (1979)(no removal of default judgment mandated where counsel's explanation for failing to appear at status conference for third time was simply "the product of a consciously chosen course of conduct on the part of counsel").

[7] Following oral argument, and in response to our request for supplemental briefs, attorney Ellis, in a letter dated December 7, 2007, informed us "the Employee no longer contends that [the judge] abused his discretion by refusing to reschedule the Employee's Hearing. However, the Employee continues to maintain . . . [the judge] committed an error of law in not adopting the impartial report. . . ." We nevertheless address the abuse of discretion issue because it was briefed and orally argued, and because it would be illogical to entertain the employee's remaining argument in the absence of grounds to challenge the decision dismissing the claim.

is positively absurd. To base an award of benefits solely on the impartial medical examiner's report would clearly violate, among other things, the insurer's due process right to challenge the factual foundation of the doctor's opinion, and ignore the express procedural requirements of our workers' compensation statute. See Haley's Case, 356 Mass. 678, 681-682 (1972); see also Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 596 (2000); G. L. c. 152, § 11.

We conclude the employee's attorneys have violated G. L. c. 152, § 14(1), by filing and pursuing this appeal without reasonable grounds. In order to better ascertain the amount of the "whole costs of the proceedings" to be assessed upon attorneys Berg and Ellis, we request that insurer's counsel provide them, and this board, with an affidavit describing the fees and costs incurred by the insurer in defense of this appeal. Insurer's counsel shall have twenty days from the filing date of this decision to comply with this request; employee's counsel shall have twenty days from receipt of the insurer's affidavit to respond. We retain jurisdiction of the case for the sole purpose of determining the amount due under
§ 14(1).

The conduct of the employee's attorneys in this case demonstrates a profound misunderstanding of the law and our dispute resolution process. Moreover, the judge realized, as do we, that counsel placed their own financial interest ahead of their client's. (Dec. 547-548.) Rather than accept the insurer's offer to voluntarily accept the employee's claim for psychiatric benefits, they chose to continue the matter and to insist on the payment of fees and costs that were *not due*. [8] Id. On the day of the continued hearing, without any justification, they failed to appear. In effect, the employee's attorneys converted an offer to accept their client's claim for benefits into a denial and dismissal of his claim with prejudice. Accordingly, we are compelled to refer this entire matter to the

[8] The employee's attorneys advance no argument on appeal that they would be entitled to the payment of attorney's fees or costs under § 13A in light of the insurer's offer to accept the claim well in advance of the September 8, 2006, hearing. The insurer did eventually withdraw its offer to accept the claim shortly before the judge opened the record at the September 8, 2006, hearing. (Tr. 5.) However, because the employee, and counsel, failed to appear at the continued hearing, and the employee failed to prevail, no attorney's fee is due. See footnote 3, supra.

Senior Judge to take whatever action, pursuant to G. L. c. 152, § 7C, she deems appropriate.[9]

We affirm the decision, and retain jurisdiction on the § 14(1) issue. A second decision pertaining to the amount due under § 14(1) shall issue in due course.

So ordered.

_____
Mark D. Horan
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

Filed: **June 18, 2008**

[9] 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.