COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.** 006502-06

Quyana Neal	**EMPLOYEE**
Mary Immaculate Nursing Center	**EMPLOYER**
Massachusetts Care S.I.G.	**SELF INSURER**

REVIEWING BOARD DECISION

(Judges Koziol, Costigan and Fabricant)
The case was heard by Administrative Judge Bean.

APPEARANCES

Teresa B. Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

KOZIOL, J. The employee appeals from a decision denying her claim for § 36 permanent loss of function benefits, and imposing a § 14(1)[1] penalty against her attorney for advancing a frivolous claim. The employee argues the judge erred as a matter of law by: 1) refusing to "assist" her in securing the testimony of the manager of the Department of Industrial Accidents' impartial unit, which the employee claims would have allowed her "to explore the issue of partiality" of the § 11A impartial physician, Dr. George Lewinnek, (Employee br. 14); and, 2) finding her attorney culpable under § 14(1). We affirm the decision.

This is the second time the employee has appealed a decision of this administrative judge raising the issue of Dr. Lewinnek's bias. We summarily affirmed the administrative judge's first

[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.

decision, wherein the judge refused to strike Dr. Lewinnek's § 11A report on the ground of bias and found, based on the doctor's opinions, that the employee's March 11, 2006, work-related injury to her back had resolved by September 5, 2006. The Appeals Court affirmed that decision. Neal's Case, 74 Mass. App. Ct. 1113 (2009)(Memorandum and Order Pursuant to Rule 1:28).

The present case concerns the employee's claim, filed on October 24, 2007, seeking payment of § 36 permanent loss of function benefits in the amount of $2,147.22. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file). In October of 2007, after receiving the employee's claim, the self-insurer's adjuster, Susan Sobolewski, contacted the employee's attorneys and spoke with Carolyn Mosley, a representative of Ellis & Associates. (Dec. 749.) Ms. Sobolewski conveyed the self-insurer's offer to pay the employee the amount claimed.[2] (Dec. 749.) Ms. Mosley accepted the offer, contingent on the self-insurer sending the check for the claimed amount to Ellis & Associates, rather than directly to the employee. The admitted purpose was to allow Ellis & Associates to deduct their expenses prior to paying the balance to the employee. (Dec. 749-750.)

The self-insurer sent all prior compensation checks directly to the employee. Accordingly, Ms. Sobolewski refused to send the § 36 payment directly to employee's counsel without the employee's signed written authorization. (Dec. 750.) After consulting with Attorney Ellis, Ms. Mosley rejected the self-insurer's offer to pay under those conditions. (Dec. 750.) Ms. Sobolewski withdrew the self-insurer's offer to pay in December of 2007.

The employee's § 36 claim proceeded to a § 10A conference, and the judge denied the claim. The employee appealed, and on September 29, 2008, a second § 11A examination was performed by Dr. Lewinnek, who opined that the employee suffered from no impairment as a result of her work injury. (Dec. 753.) The matter proceeded to a hearing on the employee's claim for payment of § 36 benefits, in the amount the self-insurer previously offered to pay. (Dec. 749-750; see Ex. 5 and 6.) The employee did not seek to depose Dr. Lewinnek but, again alleging

[2] The judge found the insurer determined it would be more cost-effective to pay the claim than to litigate it. (Dec. 749.)

bias, moved to strike his report.[3] She also sent a subpoena to Sandra Gildea, the manager of the impartial unit at the Department of Industrial Accidents, seeking her appearance as a witness at the hearing. The employee stated she needed Ms. Gildea "to testify as to the procedure for hiring and firing § 11A impartial medical examiners." (Dec. 748; December 10, 2008 Tr. 8-9.) Although the judge refused to assist the employee in securing Ms. Gildea's appearance at the hearing, he did reschedule the motion hearing in order to allow the employee time to investigate alternative ways to obtain the information sought. (December 10, 2008 Tr. 10-14.) At the rescheduled motion hearing, the judge denied the motion to strike Dr. Lewinnek's report. (Dec. 748; December 22, 2008 Tr. 4-7.)

In his decision, the judge again found insufficient evidence to support a finding of bias on the part of the impartial physician, either against the employee in particular, or against employees in general. (Dec. 751-753.) Relying on Dr. Lewinnek's opinion, the judge found the employee had sustained no permanent loss of function in her low back and denied the employee's claim. (Dec. 758.) The judge, sua sponte, assessed a § 14(1) penalty against employee's counsel in the amount of $4,112.50,[4] for bringing a frivolous claim by rejecting the self-insurer's reasonable offer to pay 100% of the employee's claim, thereby forcing the matter to hearing.[5] (Dec. 757-759.)

---

[3] Although the employee's brief contains multiple references to Dr. Lewinnek's "testimony," that testimony appears to be from the previous hearing as the doctor was never deposed during this hearing. (Employee br. 17, 24-25.)

[4] The judge found that $4,112.50 represented the "whole cost of the proceeding." (Dec. 758.) On appeal, the employee does not challenge the amount of the penalty, only the judge's finding that her counsel violated § 14(1). See Packard v. Swix Sport USA, Inc., 22 Mass. Workers' Comp. Rep. 305, 308 n.7 (2008).

[5] The judge found no merit to the employee's claim alleging the self-insurer violated § 14(1) by unreasonably refusing to send the § 36 payment to employee's counsel without written authorization from the employee. (Dec. 753-755, 758.) The employee does not challenge the judge's ruling on this issue. The judge also denied the self-insurer's claim alleging the employee's attorney violated § 14(2) by fraudulently advancing the employee's claim. (Dec. 757, 758, 759.) The self-insurer has not appealed.

On appeal, the employee re-argues the issue of bias, but fails to identify any new evidence.[6] Instead, she argues that the judge committed reversible error by refusing to "assist" her by compelling Ms. Gildea's attendance. Id. at 26-28. We see no error in the judge's ruling.

During lengthy discussions with the parties on the record, the judge expressed doubt that Ms. Gildea would have any of the information sought by the employee, suggesting the information could be obtained more appropriately through other sources. (December 10, 2008 Tr. 7-23, 74-76.) As the judge explained, there is a committee, of which Ms. Gildea is not a member, charged with reviewing complaints against impartial physicians and determining whether to remove them from the list of impartial medical examiners.[7] (Dec. 752; December 10,

---

[6] The employee presents over fourteen pages of argument on the bias issue, only three of which address the new issue regarding the subpoena. (Employee br. 26-28.) The remaining eleven pages advance an argument identical to that appearing in the employee's brief filed in her prior appeal. See Rizzo, supra, at 161 n.3.

[7] General Laws c. 152, §§ 11A, provides, in relevant part:

> (1) With the assistance of the medical consultant to the commissioner and the administrative judges, the senior judge shall periodically review and update a roster of impartial medical examiners who are certified specialists in various medical fields and who are willing to make prompt reports and be deposed as hereinafter provided. The department shall establish criteria for being named to and remaining on said roster.
>
> . . .
>
> (3) . . . In reviewing and updating said roster, the senior judge shall utilize the criteria developed by the health care services board pursuant to section thirteen.

General Laws c. 152, § 13, provides, in relevant part:

> (3) There is hereby created a health care services board composed of the commissioner or his designee as an ex officio member and chairman, one person representing chiropractors, one person representing dentists, one person representing hospital administrators, one person representing physical therapists, and six physicians representing different health care specialties which the commissioner determines are the most frequently utilized by injured employees. The board shall also have one person

2008 Tr. 10-14.) The judge also suggested the information could be obtained through a Freedom of Information Act request. (December 10, 2008 Tr. 13.) The judge allowed the employee additional time to pursue other avenues to obtain any complaints which might have been lodged against Dr. Lewinnek. (December 10, 2008 Tr. 22.) However, when the hearing reconvened, employee's counsel presented no evidence any such attempts were made. (December 22, 2008 Tr. 4-7.)

The judge's wide discretion to control the conduct of his courtroom, (see, e.g., Saez v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 20 [1993]), includes the authority to determine whether to assist a party who has subpoenaed a witness in securing the witness's attendance. G. L. c. 152, § 11B;[8] see also 452 Code Mass. Regs. § 1.12(7)(administrative judge may quash or

---

> representing employees, one person representing employers, and one person representing the public. . . . The health care services board shall receive and investigate complaints from employees, employers and insurers regarding health care providers who provide services under this chapter who are alleged to have engaged in patterns of (i) discrimination against compensation claimants, (ii) overutilization of procedures, (iii) unnecessary surgery or other procedures, or (iv) other inappropriate treatment of compensation recipients. Where such board finds a pattern of abuse, it shall refer its findings to the appropriate board of registration.
>
> . . .
>
> The health care services board shall develop criteria in order to select and maintain a roster of qualified impartial physicians to provide objective medical opinions pursuant to sections eight and eleven A of this chapter. Said criteria shall further be used, when necessary, to remove any impartial physicians from the roster when a medical provider fails to comply with the criteria. Upon the establishment of criteria, the health care services board shall refer said criteria to the senior administrative judge who shall develop a roster of impartial physicians.

[8] We note that no provision of the Act gives parties the authority to require or compel the attendance of a witness whom they may have served with a subpoena. Instead, § 11B states in pertinent part:

> Any member of the board may subpoena witnesses . . . as relate to questions before such member. The fee for attending as witness before the department or a member of the board

modify subpoena if it is unreasonably oppressive, beyond the scope of discovery, or seeks privileged documents). The judge's reasons for finding Ms. Gildea's testimony unnecessary were informed and rational and do not reflect the type of arbitrary, capricious, or whimsical thinking which would constitute an abuse of his discretion. See Davis v. Boston Elev. Ry., 235 Mass. 482, 496 (1920). In the prior appeal, the Appeals Court held, "[t]he issue of [Dr. Lewinnek's] impartiality was thoroughly vetted during the hearing. In reviewing the judge's decision we cannot say that he abused his considerable discretion in reliance upon both the report and the deposition testimony of the doctor." Neal's Case, supra. Given the lack of any new evidence on the bias issue, there was no error in the judge's refusal to strike the impartial report.

The employee also contends the judge erred, as a matter of law, in finding that her attorney violated § 14(1) by pursuing a frivolous claim. The employee maintains negotiations simply broke down when the self-insurer refused to honor her attorney's request to send her check to them, as was their claimed "usual practice," and then withdrew its offer to pay. (Employee br. 28-29.) This is a mischaracterization of the testimony and does not reflect the judge's findings. The judge found that all prior checks had been sent directly to the *employee*, and that the *employee's counsel* refused the self-insurer's offer after the self-insurer demanded written authorization from the employee permitting it to mail the check directly to Ellis & Associates. (Dec. 750.) The employee argues the self-insurer had no authority to require such written authorization. To the contrary, the self-insurer's actions are supported by case law. Rivera v. H.B. Smith Co., Inc., 27 Mass. App. Ct. 1130 (1989)(insurers must mail or deliver checks to employees at their homes). As the judge found, it was certainly reasonable for the self-insurer to

---

> shall be that provided for witnesses before the superior court department of the trial court. The superior court shall have jurisdiction to enforce the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records.

General Laws, c. 152, § 11B. As suggested by § 11B, the longstanding practice is to request the administrative judge to sign a subpoena seeking the attendance of a material witness. Should the witness then fail to appear, the party may, in turn, bring that subpoena to the superior court for enforcement. As illustrated by this case, making such a request prior to the date of hearing, would allow the judge to make the preliminary determination of whether such measure is necessary in advance, thereby avoiding unnecessary delay of the proceeding.

request the employee's written authorization before sending the check to her attorney instead of directly to her.[9]

The judge did not err in finding the employee's attorney acted unreasonably by prosecuting the claim through the hearing level rather than accepting the self-insurer's offer of the full amount of § 36 benefits claimed.[10] As the judge found, the actions of employee's counsel put his own interest in being reimbursed for expenses above his client's interest in being compensated for her alleged permanent loss of function of her back.[11] (Dec. 758.) Therefore, we affirm the judge's decision ordering employee's counsel to pay "the whole cost of the proceeding" pursuant to § 14(1).

---

[9] We note the self-insurer may be subject to a penalty if "all payments due an employee" are not made within fourteen days of receipt of the agreement. G. L. c. 152, § 8(1). In addition, the judge observed the self-insurer could be liable for a second payment if the employee did not receive her § 36 payment because it was not sent directly to her. (Dec. 754.)

[10] The argument advanced by Ellis & Associates that it has a "statutory lien" on the § 36 amount which the insurer refused to honor is devoid of merit. The employee presented no evidence a lien was filed under G. L. c. 221, § 50, and the board file does not contain any such lien. Rizzo, supra at 161 n.3. In addition, as the judge found, no attorney's fee was due at time the self-insurer's offer was made. (Dec. 755-756.) To the extent the employee refers to "necessary expenses," they are awarded only in conjunction with attorney's fees; no expenses are due where no fee is due. Packard v. Swix Sport USA, Inc., supra at 310 (2008); see G. L. c. 152, § 13A(1-6).

[11] The judge found employee's counsel had violated Rules 1.4 and 1.7 of the Massachusetts Rules of Professional Conduct by failing to communicate the settlement offer to the employee in a timely manner, and by putting his interests (reimbursement of expenses) ahead of the employee's. (Dec. 756-757.) The judge concluded those findings required him to refer the matter to the senior judge pursuant to § 7C. (Dec. 758.) 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.

The employee does not challenge these findings on appeal.

So ordered.

_____

Catherine Watson Koziol
Administrative Law Judge

_____

Patricia A. Costigan
Administrative Law Judge

_____

Bernard W. Fabricant
Administrative Law Judge

Filed: ***November 8, 2010***