COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 041089-03**

Ramona Richards	Employee
US Bancorp	Employer
St. Paul Fire & Marine	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge McDonald.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Sr., Esq., for the employee at hearing and on appeal
Pamela G. Smith, Esq., for the Insurer

KOZIOL, J. The employee appeals from a decision determining that the principle of res judicata bars litigation of her claim for incapacity and medical benefits,[1] and finding that her counsel, Attorney Ellis, brought her claim without reasonable grounds in violation of G. L. c. 152, § 14(1).[2] (Dec. II, 6-8.) The judge ultimately assessed costs pursuant to § 14(1), ordering Attorney Ellis to pay the insurer $8,742.50. (Dec. III, 5.) The employee argues the judge erred by: 1) finding her claim is barred; 2) finding Attorney Ellis prosecuted the action without reasonable grounds; and, 3) assessing costs in the amount of $8,742.50. We affirm.

[1] On June 13, 2007, the judge filed the first hearing decision denying and dismissing the employee's claim for incapacity benefits under §§ 34 and 35, referred to as "Dec. I." The judge's decision of April 29, 2013, is referred to as "Dec. II" and his "amended decision" of June 13, 2013, is referred to as "Dec. III."

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

> If an administrative 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.

The employee's appeal rests on her contention that liability for an industrial injury was established by the judge's prior hearing decision, which was summarily affirmed by the reviewing board and ultimately affirmed by the Massachusetts Appeals Court. Richards's Case, 74 Mass. App. Ct. 1112 (2009)(Memorandum and Order pursuant to Rule 1:28). She argues G. L. c. 152, § 16, entitles her to bring a claim "based on present incapacity or the causal relationship of the present incapacity to the original injury." (Employee br. 13-14.) We disagree.

We start by noting the insurer has never made any payments on the employee's claim. (Dec. II, 5.) The employee alleged that on December 5, 2003, she sustained a back injury arising out of and in the course of her employment. (Dec. I, 6.) Upon receiving the employer's first report of injury, the insurer filed a timely notification of denial contesting, among other things, the issue of liability. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). The employee filed a claim for incapacity and medical benefits which was denied at conference and became the subject of a hearing. On June 13, 2007, the judge issued his first hearing decision denying and dismissing the employee's claim. (Dec. I, 14.) Ultimately, on May 19, 2009, the Massachusetts Appeals Court affirmed the judge's decision. Richards's Case, supra. The employee did not seek further appellate review of that decision.

Thereafter, the employee filed a series of claims seeking incapacity benefits for the alleged back injury of December 5, 2003. Despite seeking differing periods of incapacity benefits, the employee asserts the present claim, filed January 11, 2012, is "the exact same claim" that had been filed previously "on three occasions."[3] (Employee br. 5.) Each of these claims was administratively

[3] The Department's case management system, (CMS), shows the employee filed four claims August 31, 2010, October 6, 2010, August 12, 2011, and January 11, 2012. Rizzo, supra. The filing dates stated by the judge in his decision, (Dec. II, 2), and the employee

withdrawn by conciliators on the ground that res judicata barred the employee's claim. (Dec. II, 2.) When the employee's January 2012 claim was withdrawn, the employee appealed to the senior judge. G. L. c. 152, § 10(2).[4] On April 12, 2012, the senior judge filed a Memorandum of Disposition referring the claim to the Industrial Accident Board for assignment to a § 10A conference. (Dec. II, 2.)

The judge denied the employee's claim at the conference, and the employee appealed. The judge bifurcated the hearing proceeding in order to make an initial ruling as to whether the employee's claim was barred and to determine whether either party brought or defended a claim without reasonable grounds in violation of § 14(1).[5] (Dec. II, 3.) The only exhibits admitted at the hearing were the employee's memorandum of law and the insurer's hearing brief; no testimony was taken. (Tr. 5-6.) After hearing the parties' oral arguments, receiving the parties' briefs on the issues, and taking judicial notice of the board file, the judge issued a second hearing decision, making the following pertinent findings:

> 4. In the June 13, 2007, hearing decision, I had credited the employee's testimony that she was doing the activity she described, and felt a 'pop' in her back. There was no dispositive medical evidence that the 'pop' or pain the employee experienced was due to a change or lesion.[5]

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in her brief, (Employee br. 5), differ slightly from each other as well as from the official dates shown on the case history page recorded in CMS. Hereinafter, we refer to the dates shown on that page in CMS. The August 31, 2010 and October 6, 2010 claims sought incapacity benefits from the day after the judge's first decision was filed, June 14, 2007, and continuing. Rizzo, supra. The August 12, 2011 and January 11, 2012 claims sought incapacity benefits from May 24, 2010, and continuing. Id.

[4] General Laws, c.152, § 10(2), states in pertinent part:

> Any party aggrieved by an extension of the conciliation period or by the conciliator's withdrawal of a claim or complaint may file a written appeal with the senior judge who, if all requested information has been submitted, shall set a date for referral to the industrial accident board.

[5] Although the employee sought § 14 penalties against the insurer, the insurer did not seek § 14 penalties against the employee. (Tr. 5-8.) The judge, relying on the senior judge's Memorandum of Disposition, raised the issue sua sponte. (Tr. 8.)

> [5] Although the term 'personal injury' is not comprehensively defined in § 1(7A), courts and [sic] reviewing board have broadly defined it to include 'whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.' *Ames v. Town of Plymouth*, 19 Mass. Workers' Comp. Rep., 150, 154 (2005). 'An injury may occur without any resulting incapacity; however, with or without incapacity, the employee must prove the injury is *a consequence in the form of a lesion or change.' Id.,* [emphasis supplied].

5. The hearing decision was unambiguous in its finding that, based upon the totality of the employee's testimony, as well as the evidence and expert medical opinion, 'the employee did not sustain a compensable injury arising out of or in the course of her employment.' [Dec. at 13, 14]

6. The hearing decision denied and dismissed the employee's claim, therefore, initial liability for a compensable injury was not established.

(Dec. II, 4; footnote and brackets in original.) The judge then ruled that the issue of whether the employee sustained an injury arising out of and in the course of her employment, "had been decided adversely to the employee in the prior hearing decision. The affirmation of that decision by the Reviewing Board and the Appeals Court made it a final determination on the merits of the employee's claim. Res judicata has its full preclusive effect on the issue of original liability." (Dec. II, 6.) The judge also determined that the employee's attorney brought the claim without reasonable grounds in violation of § 14(1):

> Because the employee' claim had been denied on the basis of original liability, notwithstanding the employee attorneys' interpretation, and because there was a final judgment on that issue, there is no reasonable expectation that the employee would succeed in the present proceeding. Because each of the documents that moved the employee's claim forward to this point were signed by James N. Ellis, Esq., I find that he shall be liable for the whole costs of this proceeding.

(Dec. II, 7.) As will become pertinent later in this decision, the employee's timely appeal of the judge's second decision was assigned to this reviewing board panel in December of 2013.

On appeal, the employee argues the judge erred in concluding that his first hearing decision determined the insurer had no liability for an alleged injury to the employee's back. In advancing this argument, the employee relies upon the following rulings and findings made by the judge in his first hearing decision.

> **Liability**
>
> The employee has failed to meet her burden of proof that she sustained an injury arising out of and in the course of her employment on December 5, 2003. Although I credit her testimony that she was lifting boxes on that date, and felt a pain in her back and left ribs, I find she was not credible as to the reason for her leaving employment. The medical evidence of her own treating physicians does not support disability from her employment. Because the opinion of Dr. McConville is based on an inaccurate foundation, I do not adopt it.

(Dec. I, 14, emphasis in original.) The employee argues this particular paragraph shows that the judge's findings were ambiguous and "fairly support the employee's position *taken in the subsequent proceeding* that liability was established earlier for a back condition." (Employee br. 12; emphasis supplied.) She argues § 16 permits her present claim because the judge "in effect found that the employee sustained a personal injury arising out of and in the course of employment, just one that he found not to be disabling during the time period put into issue at the hearing." (Employee br. 15-16.) She argues the senior judge also found the administrative judge's statement, "I credit her testimony that she was lifting boxes on that date, and felt a pain in her back and left ribs," was sufficient to "le[ave] the liability door open for the employee to pursue a future claim should she suffer a period of disability that is supported by sufficient medical evidence." (Memorandum of Disposition, 4/12/12, at 2.)

The employee's argument fails to address the rulings of law made by the judge in his first decision, or her own statements made in her prior appeal. In his

first decision, the judge ruled, "[t]he employee has failed to meet her burden of proof that she sustained an injury arising out of and in the course of her employment on December 5, 2003," a ruling squarely addressing the threshold issue of original liability. (Dec. I, 14.) The judge also found, "I credit the employee's testimony that she was lifting boxes on December 5, 2003. I find, however, that she did not sustain an injury arising out of her employment." (Dec. I, 12.) He ruled, "[b]ased upon the totality of the employee's testimony, as well as the evidence and expert medical opinion, I find that the employee did not sustain a compensable injury arising out of or in the course of her employment." (Dec. I, 13.)

Any ambiguity, inconsistency or error in the judge's original decision, especially regarding his rulings on the threshold issue of whether liability had been established for an injury, should have been addressed in the employee's primary appeal. In her first appeal, which focused on the issues of causal relationship and disability, the employee conceded that the judge had ruled adversely on the issue of liability, stating, "[t]he judge has also concluded that the Employee *was not injured* on the date in question, despite the actions by the Employer on the following Monday." (Employee br. 2/04/08, 12; emphasis supplied.) At that time she argued, "[f]or the judge to ignore all of this evidence that points directly to an injury occurring on the previous Friday simply goes against logic and common sense." Id. Thus, in her first appeal, the employee not only acknowledged the judge determined that she had not sustained a personal injury on December 5, 2003, but also argued this conclusion was in error.

Liability is established, "[i]f an employee . . . receives a personal injury arising out of and in the course of his employment . . . ." G. L. c. 152, § 26. Conversely, where there is no personal injury, there is no liability. The judge expressly ruled that the employee did not sustain a compensable injury on December 5, 2003. (Dec. I, 3.) The Supreme Judicial Court has instructed, if an employee suffers a personal injury that arises out of and in the course of her

employment, her "injury is therefore 'compensable' irrespective of whether compensation for [her] injury is available under the act." Saab v. Massachusetts CVS Pharmacy, LLC., 452 Mass. 564, 569-570 (2008). In affirming the original decision, the Appeals Court observed that the judge found "the incident with the box occurred, but that the employee did not sustain a compensable injury arising out of her employment," and that her claim was denied "[l]argely upon grounds of credibility." Richards's Case, supra; (Dec. II, 2.) The employee did not seek further appellate review of that decision. Therefore, the judge's rulings became final and they are beyond the scope of our review.[6] See Associated Industries of Massachusetts Mut. Ins. Co. v. Hough, 84 Mass. App. Ct. 531, 532 (2013). Where initial liability was not established in the original decision, § 16 by its own terms, does not apply.[7]

The employee also argues the judge erred in finding her attorney pursued her claim without reasonable grounds, warranting the imposition of § 14(1) penalties. In support of this argument, the employee relies heavily on the senior judge's ruling allowing the case to proceed to a conference, as constituting proof

[6] The employee correctly argues the judge erred in stating that the fact the employee had not been awarded an attorney's fee in the first hearing decision meant that liability had not been established in this case. (Dec. II, 5); Gonzalez's Case, 41 Mass. App. Ct. 39, 42 (1996)(no fee due where finding of liability has been made but no weekly or medical benefits have been ordered). The error was harmless under the circumstances.

[7] General Laws, c. 152, § 16, provides an exception to the rule of finality in a discrete set of circumstances not relevant here, providing in pertinent part:

> When in any case before the department it appears that compensation has been paid or when in any such case there appears of record a finding that the employee is entitled to compensation, no subsequent finding . . . discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res adjudicata as a matter of law, and such employee or his dependents, in the event of his death, may have further hearings as to whether his incapacity or death is or was the result of the injury for which he received compensation . . . .

of the reasonableness of her claim.[8] The senior judge's ruling cannot, without more, be considered conclusive evidence that the employee's counsel had reasonable grounds to pursue the claim. As the administrative judge noted, in allowing the claim to proceed to a § 10A conference, the senior judge expressly "cautioned that if the administrative judge found that 'counsel has proceeded without reasonable grounds, *especially given the extensive appellate history in this matter*, § 14 sanctions remain available.' " (Dec. II, 5; emphasis in original.) The standard is one of objective reasonableness, and it is analyzed by inquiring into whether the action presents "[a] fair question of law" or whether there is "some plausibility" to the argument advanced in the case. DiFronzo's Case, 459 Mass. 338, 342 (2011). In light of the judge's rulings in his first decision, and the employee's concessions made in her previous brief to the reviewing board, the judge did not err in making the determination.

Lastly, the employee takes issue with the amount of the § 14(1) penalty ordered by the judge. (Dec. III, 5.) The employee argues the judge's order of "Section 14(1) sanctions against employee counsel in an amount of 160 percent of the current hearing-level attorney fee for an employee who prevails, in a single-issue case which entailed no evidentiary hearing, raised no medical issues, and required no depositions is arbitrary, capricious, vindictive and an abuse of discretion." (Employee Supplemental br. 7.) The employee correctly notes that, on the date of the judge's decision, $5,473.62 was the standard base attorney's fee for employees who prevailed at a hearing pursuant to § 13A(5). However, the employee fails to point to any authority limiting the judge to that figure when assessing a penalty under § 14(1). Indeed, because § 14(1) requires assessment of "the whole cost of the proceedings," we think that, in a case such as this, where

[8] In considering the employee's § 10(2) appeal, the senior judge noted "[i]t is alleged that the employee attempted to raise new issues and a new period of disability." (Memorandum of Disposition, 4/12/12, at 1.) On appeal, the employee does not argue that she raised any new issues, claiming only that she sought benefits for a new period of disability based on the same alleged injury, an injury which the judge previously found she had not sustained. (Employee br. 5.)

the insurer was forced to send counsel to defend against the claim through every level, including an appeal of the conciliator's withdrawal of the claim, and where the insurer prevailed at each stage, there is no justification for limiting an award to one encompassing only the costs of the hearing. Moreover, to the extent the employee argues her attorney should not be bound to pay for insurer counsel's attorney at a rate agreed to by the insurer and its counsel, we observe that the judge made findings disregarding, or disallowing, certain charges appearing in the insurer's counsel's affidavit, giving sound reasons for doing so, and also gave sound reasons for supporting the assessed charges. (Dec. III, 3-4.) In the circumstances, we cannot say his determination was wrong as a matter of law, or that it was the product of whimsical thinking so as to be arbitrary, capricious, or an abuse of discretion. Davis v. Boston Elevated Ry., 235 Mass. 482, 496-497 (1920).

Although not raised by the employee on appeal, a procedural irregularity causes us to take this opportunity to clarify the process that should be used when a case is bifurcated for adjudication. Here, after bifurcating the case in order to make preliminary findings on whether the employee's claim was viable and whether a § 14(1) penalty was warranted, the judge filed a hearing decision ordering:

> The insurer shall submit, within twenty-one days of the filing of this decision, to Atty. Ellis, and to this board, an affidavit describing the fees and costs incurred by the insurer in the defense of the employee's claim; Atty. Ellis shall have twenty-one days from receipt of the insurer's affidavit to respond. I retain jurisdiction over this case for the sole purpose of determining the whole costs of the proceedings to be assessed against the employee's attorneys.

(Dec. II, 7.)[9] Having received the April 29, 2013 hearing decision and its cover letter instructing aggrieved parties to file an appeal within thirty days of that decision, the employee's counsel filed the present appeal. The parties also

[9] The judge's findings purporting to retain jurisdiction over the claim gave the parties no information as to when the final decision would be rendered.

submitted the information requested by the judge. (Dec. II.) The appeal proceeded through the briefing process without the parties receiving a determination of the amount of the penalty assessed. On December 20, 2013, insurer's counsel wrote to the judge notifying him that the case was pending before a panel of the reviewing board and asking when the parties could expect a disposition regarding the amount of the § 14(1) penalty. Rizzo, supra. The judge directed the parties to a June 20, 2013 "amended" hearing decision ordering the employee's attorney to pay the insurer a § 14(1) penalty in the amount of $8,742.50. (Dec. III, 5.) The employee then sought leave from the Director to file a late appeal.[10] After noting the late filing was due to circumstances beyond the employee's control, the director informed the employee no action was necessary because

> [t]he judge's supplemental decision, designated as an 'amended' decision that you now seek to appeal is in essence the same case with substantially the same issues currently before a panel of the reviewing board. Therefore, any recourse rests with that body. I have copied the reviewing board panel members on this correspondence to apprise them of your desire to address the judge's supplemental decision.

(Director's Finding on Late Appeal to the Reviewing Board Pursuant to M.G.L. c.152, Section 11C, 1/28/14; Rizzo, supra.) Thereafter, we gave the parties additional time to file supplemental briefs addressing any new issues raised by the judge's third hearing decision. Rizzo, supra. Accordingly, the case did not become ready for disposition until March, 2014.

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[10] General Laws, c. 152, § 11C, provides in pertinent part:

> A party who has by mistake, accident, or other reasonable cause failed to appeal from a decision within the time limited herein may within one year of the filing of said decision petition the commissioner of the department who may permit such appeal if justice and equity require it, notwithstanding that a decree has previously been rendered on any decision filed, pursuant to section twelve.

General Laws, c. 152, § 1(1A) defines "[c]ommissioner," as "the director of the department of industrial accidents established under chapter twenty-three E."

The second hearing decision, (Dec. II), did not completely dispose of the issues presented in the bifurcated case because the amount of the penalty had not yet been determined. Therefore, it amounted to no more than an interlocutory order, and should not have been filed as a § 11 decision. See Levesque v. State Road Cement Block Co., Inc., 21 Mass. Workers' Comp. Rep. 39, 42 (2007)(reviewing board lacks authority to hear appeals from interlocutory orders); Davis v. P.A. Frisco, Inc., 18 Mass. Workers' Comp. Rep. 295, 287-288 (2004)(judge cannot issue a further decision on the same claim after appeal has entered). Thus, the goal of promoting judicial economy, which the judge initially sought to foster by bifurcating the claim, was frustrated by issuance of the interlocutory "decision" simultaneously directing the parties to file their appeal within thirty days of its receipt *and* to submit additional documentation for the judge's further consideration and action. (Dec. II.)

Where, as here, the preliminary proceedings result in rulings that do not resolve all of the issues presented by the claim, the judge should advise the parties of his rulings, requesting the submission of additional material addressing the remaining issues, and/or notifying the parties that further proceedings will be conducted in order to address the remainder of the issues in the case. For the sake of clarity, the judge should also inform the parties that one full and final decision, incorporating his findings and rulings on all of the issues necessary to dispose of the case, and triggering the parties' appellate rights, will issue *after* the remainder of the case is completed.[11]

We affirm the decision of the administrative judge.

So ordered.

[11] Refraining from filing a decision disposing of only a portion of the claim avoids piecemeal litigation and promotes judicial economy by saving the parties the exercise of paying two separate appeal fees or, in the alternative, as happened here, petitioning the director for leave to file a late appeal, and writing what amounts to two separate briefs on the issues.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **July 8, 2014**