

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
INDUSTRIAL ACCIDENTS

BOARD NO. 035598-05

Randall Perry
Chaves Heating & Air Conditioning
Travelers Property & Casualty Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Levine)

The case was heard by Administrative Judge Benoit.

APPEARANCES

Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Sr., Esq., for the employee on appeal
Donna J. Gully-Brown, Esq., for the insurer

HORAN, J. The employee¹ appeals from a decision denying his claim for § 13A(5)² attorney's fees and expenses. We affirm the decision in part, and reverse it in part.

The genesis of this dispute dates to the litigation of the employee's prior claim for § 36 benefits. That claim was denied at conference, and the employee appealed. On the original date set for the hearing, the matter was postponed

¹ On April 17, 2009, the department received the claim in this matter. It was filed by James Ellis (on a Form 115) as a third party claim for attorney's fees and costs, and for penalties under § 14. At the hearing, Teresa Brooks Benoit appeared for the employee (Tr. 3); no appearance was entered on behalf of James Ellis. The hearing decision was appealed by the employee on January 7, 2011. Nevertheless, the hearing decision describes the issue *sub judice* as the third party claim of employee's counsel for attorney's fees and costs, and the parties tried this issue by consent. The decision does not identify § 14 as an issue in dispute, nor is it an issue on appeal.

² General Laws c. 152, § 13A(5), provides, in pertinent part:

Whenever an insurer . . . contests a claim for benefits and then . . . accepts the employee's claim . . . within five days of the date set for a hearing pursuant to section eleven . . . the insurer shall pay a fee to the employee's attorney . . . plus necessary expenses.

because the employee failed to attend the previously scheduled § 11A impartial medical examination. The examination was rescheduled, and the employee submitted to it. (Dec. 2.)

Shortly after receiving the § 11A report, the Insurer made an Offer To Pay § 36 benefits based on [the impartial physician's] evaluation, which specified a *higher* award amount than the employee had claimed. Seven months later, on the day of the Hearing, the Employee accepted the Insurer's offer to pay § 36 benefits and withdrew his appeal. The Employee's attorney thereafter filed the instant claims for Attorney's Fees and expenses.

(Dec. 2-3.)³

Following the conference on the employee's claim for attorney's fees and costs, the judge denied the fee claim, but ordered the insurer to reimburse the employee \$950 in expenses. Both parties appealed, and the matter proceeded to hearing. At that hearing, the employee argued that because the insurer's "offer to pay was not made more than five days prior to the originally scheduled Hearing date," [on the employee's original § 36 claim], attorney's fees and expenses were due under § 13A(5). (Dec. 3.) However, because the postponement of the prior hearing was due to the employee's failure to attend the first scheduled § 11A examination, the judge denied the § 13A(5) claim, as the insurer's offer to pay was communicated seven months prior to the actual hearing date. (Dec. 3-4.) Accordingly, he ordered the claimant⁴ to reimburse the insurer the \$950 in expenses that had been awarded at conference. (Dec. 5-6.) The judge then

³ See 452 Code Mass. Regs. § 1.19(3), which provides, in pertinent part:

When an insurer, at least two days before a conference, or 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 weekly compensation or compensation under MGL c. 152, §§ 30 or 36, and such offer is not accepted, the insurer shall not be required to pay any fee under MGL c. 152, § 13A, for such conference or hearing, unless the order or decision rendered directs a payment of said weekly or other compensation in excess of that offered.

⁴ We infer the judge was referring to employee's counsel.

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authorized the insurer “to withhold from moneys due the claimant under any other case within the Department of Industrial Accidents such funds as are necessary to recover the amount paid hereunder, including without limitation \$950.00 in expenses awarded at conference and any interest paid by Insurer thereon.” (Dec. 6.) We address two issues raised by the employee on appeal.

The employee first argues that attorney’s fees and expenses are due because the insurer did not communicate its offer to pay prior to the first “date set for hearing pursuant to section 11. . . .” G. L. c. 152, § 13A(5). This argument fails because the § 11 hearing cannot take place until after the § 11A(2) examination and report: “The impartial medical examiner . . . shall examine the employee and make a report *at least one week prior to the beginning of the hearing*, which shall be sent to each party. *No hearing shall be commenced sooner than one week after such report has been received by the parties.*” G. L. c. 152, § 11A(2)(emphasis added). The hearing on the employee’s § 36 claim did not take place until seven months after the insurer communicated its offer to pay, and after it had the opportunity to evaluate the impartial medical examiner’s report.⁵ No attorney’s fees and costs were due because there was no order or decision awarding § 36 benefits in excess of the amount of the insurer’s offer to pay. See footnote 3, supra. Therefore, we affirm the judge’s decision to deny the attorney’s fees and expenses claimed.

The employee also argues the judge erred by permitting the insurer to reimburse itself by withholding proceeds due the claimant from other cases pending at the department. We agree the judge had no authority to fashion such a remedy. Accordingly, we reverse that aspect of the decision.

⁵ Accordingly, any party who receives notice of a premature hearing date should contact the department and request a date in compliance with the statutory scheme.

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So ordered.⁶

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: **August 15, 2011**

⁶ We otherwise summarily affirm the decision, and reject the notion that 452 Code Mass. Regs. § 1.19(3) conflicts with G. L. c. 152, § 13A. Torres's Case, 75 Mass. App. Ct. 1111 (2009)(Memorandum and Order Pursuant to Rule 1:28).