

## COMMONWEALTH OF MASSACHUSETTS

### DEPARTMENT OF INDUSTRIAL ACCIDENTS

**BOARD NO.:** 060947-93

Rhomeo Tayag

**M.B.T.A.**

**M.B.T.A.**

Employee

Employer

Self-insurer

### **REVIEWING BOARD DECISION**

(Judges Horan, Costigan and Fabricant)

### **APPEARANCES**

William E. Gately, Esq., for the employee at hearing

G. Gregory Howard, Esq., petitioner, on appeal

Mark A. Teehan, Esq., for the self-insurer

**HORAN, J.** The petitioner, G. Gregory Howard, the employee's former attorney, filed an appeal of the June 7, 2007, hearing decision in this case. He contends the judge erred by not enhancing the § 13A(5) attorney's fee awarded to successor counsel. The petitioner seeks the enhanced fee to help compensate him for his representation of the employee prior to his discharge as counsel. We do not reach the fee issue because the petitioner lacks standing to appeal the decision, as he did not represent the employee at the 2007 hearing, and because there was no motion for an enhanced fee filed with the judge at hearing.

It is not disputed that the petitioner in this case performed legal services for the employee that included trying his case at a prior hearing, which resulted in a decision denying the employee's claim. On behalf of the employee, the petitioner appealed from that decision to this board, and we recommitted the case for further proceedings. See Tayag v. M.B.T.A., 12 Mass. Workers' Comp. Rep. 61 (1998). Sometime following our decision to recommit the case, the employee discharged the petitioner, and retained new counsel. The petitioner filed a notice of attorney's lien. The hearing on recommitment resulted in the 2007 decision awarding benefits and an attorney's fee pursuant to § 13A(5). (Dec. 1-3, 9.) In light of the petitioner's lien, the administrative judge ordered the attorney's fee to be held in escrow. (Dec. 12.)

The petitioner was not the counsel of record when the 2007 decision was filed. Because the decision awarding the employee benefits does not pose a "legal harm" to the petitioner, a non-participant in the litigation at the time the decision was filed, he lacks standing to appeal it. Doe v. The Governor, 381 Mass. 702, 704 (1980). Standing is an element of subject matter jurisdiction. As such, it may be raised at any time by motion, or by the court *sua sponte*, even at the appellate level. Prudential-Bache Securities, Inc. v. Comm'r. of Revenue, 412 Mass. 243, 248 (1992). We also note that because there was no claim for an enhanced fee filed with the judge below, it could not be an issue on appeal, even if the petitioner had standing to appeal the 2007 hearing decision. Based on the work he performed representing the employee, the petitioner has the right to file a third party claim against the escrowed fee awarded under § 13A(5). Accordingly, the appeal is dismissed.

So ordered.

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Mark D. Horan  
Administrative Law Judge

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Patricia A. Costigan  
Administrative Law Judge

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Bernard W. Fabricant  
Administrative Law Judge