COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 035986-05

Ricardo Vazquez	Employee
Target Corporation	Employer
Target Corporation	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Fabricant)

The case was heard by Administrative Judge McDonald.

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on brief
Susan F. Kendall, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on brief

COSTIGAN, J. The employee raises two issues on appeal from a decision awarding him payment of § 36(e) loss of function benefits for a left shoulder injury, but denying both his and the insurer's claims for statutory penalties. First, the employee alleges error in the judge's denial of § 8(1) penalties relating to the self-insurer's payment of § 36 benefits awarded in a conference order. We affirm the judge's denial of § 8(1) penalties, as he correctly found that the self-insurer's payment fully complied with both the applicable statute and the adjudicatory rules. (Dec. 12.)

Second, the employee contends that because he successfully defended against and defeated the self-insurer's § 14 complaint against him, the judge should have awarded an attorney's fee under § 13A(5). For the following reasons, we agree, and recommit this case to the administrative judge to determine the amount of that fee.

We summarize the pertinent procedural history of the employee's claim. The employee claimed benefits under § 36(e) for loss of function of his left (major) shoulder, and under § 36(j) for loss of function of his cervical spine. At conference, an order issued for payment of $2,866.59 in § 36(e) benefits for impairment of the left shoulder as well as an attorney's fee pursuant to §

13A(4) in the amount of $985.01. (Dec. 2.) The employee's claim for cervical spine loss of function benefits was denied, and he appealed. (Dec. 2.)

Upon the filing of the judge's conference order, the self-insurer issued a check to the employee in the amount of $2,235.94, noting the withholding of $630.65 as a partial fee deduction pursuant to § 13A(10). (Dec. 10-11.) Prior to hearing, the employee filed a motion to join a claim for § 8(1) penalties based on the self-insurer's failure to pay the full § 36(e) amount specified in the conference order. (Dec. 2.) The motion was allowed. Id.

At hearing, the employee claimed higher § 36(e) benefits for the left shoulder, § 36(j) benefits for the cervical spine, and a penalty under § 8(1) for the self-insurer's alleged failure to pay compensation in accordance with the conference order. The self-insurer had not appealed the conference order, but at hearing denied the employee was entitled to additional § 36(e) benefits for the left shoulder; it also denied the employee's cervical loss of function claim and asserted a claim for § 14(1) penalties,[1] alleging the employee had brought his cervical injury and loss of function claim without reasonable grounds. In response, the employee asserted a § 14(1) penalty claim against the self-insurer for what he considered to be the self-insurer's frivolous § 14(1)

---

[1] General Laws c. 152, § 14(1), provides:

Except as provided in subsection three, if any administrative judge or administrative law judge determines that any proceedings have been brought, prosecuted, or defended by an insurer without reasonable grounds:

> (a) the whole cost of the proceedings shall be assessed upon the insurer; and
>
> (b) if a subsequent order requires that additional compensation be paid, a penalty of double back benefits of such amount shall be paid by the insurer to the employee, and such penalty shall not be included in any formula utilized to establish premium rates for workers' compensation insurance.
>
> 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.

claim against him. (Dec. 2.) The judge denied both parties' § 14 claims, finding, with respect to the self-insurer's denial of the employee's cervical injury claim, that its defense was reasonable.[2]

With respect to the employee's claim for § 8(1) and § 14 penalties, the judge found:

> The employee's [penalty] claim did not challenge the deduction for an attorney's fee in a claim for § 36 benefits. His claim for penalties was [for] failure to comply with the conference order. Having been allowed to pursue a claim on an for [sic] which there is no precedent, it is reasonable to infer that there is at least a modicum of reasonableness behind it.

(Dec. 13.)[3] The judge denied the employee's § 8(1) penalty claim, on the basis that "[t]he provisions of § 13A(10) and 452 C.M.R. § 1.02 permit an insurer to reduce a cash award to the employee by up to 22% in the present circumstances."[4] (Dec. 14.) We address the employee's arguments on appeal.

---

[2] The judge addressed the employee's cervical injury claim:

> The Temporary Conference Memorandum submitted by the employee on May 15, 2007, was typed. The box designating the nature and cause of injury indicated "left shoulder - a box fell on top of shoulder." The employee's attorney on that date wrote in the box "Neck +." Also handwritten was the employee's claim for § 36 benefits for loss of function to the "c-spine and L (minor) shoulder." Because the conference memorandum had been typewritten, I infer that the writing-in was a last minute consideration. Notwithstanding the annotation on the May 15, 2007, conference memorandum, the employee has never claimed a distinct injury to his neck or cervical spine.

(Dec. 4; footnote omitted .) The judge also found that "notwithstanding the self-insurer's 'clarification' on February 13, 2008, after the hearing, that the basis for [its] § 14 claim was the employee's claim for § 8 penalties, the Insurer's [sic] Hearing Memorandum and the transcript are clear that the initial basis was the neck and cervical spine claim. (Tr. at 3.)" (Dec. 12.)

[3] As the self-insurer did not appeal the judge's decision, we do not reach the question of whether the judge properly denied the self-insurer's § 14 claim against the employee.

[4] General Laws c. 152, § 13A(10), provides, in pertinent part:

The Employee's § 8(1) Penalty Claim

The employee contends the judge erred in relying on 452 Code Mass. Regs. § 1.02's definition of the "Amount Payable to the Employee Within the First Month from the Date of the Order or Decision," as that definition "improperly expands on the statute." (Employee br. 7.) We disagree. It is well settled that,

an administrative regulation is "not to be declared void unless [its] provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate, and enforcement of such regulation[] should be refused only if [it is] plainly in excess of legislative power." Dowell v. Commissioner of Transitional Assistance, 424 Mass. 610, 613 (1997), quoting from Berris v. Department of Pub. Welfare, 411 Mass. 587, 595-596 (1992). Further, a party who questions the facial validity of a regulation "bears the heavy burden of 'proving on the record "the absence of any conceivable ground upon which [the regulation] made be upheld" ' " (citation omitted). Id. at 612.

> In any instance in which an attorney's fee under subsection (1) to (6), inclusive, is due as result of a cash award being made to the employee either voluntarily, or pursuant to an order or decision, the insurer may reduce the amount payable to the employee within the first month from the date of the voluntary payment, order or decision, by the amount owed the claimant's attorney; provided, however, that the amount paid to the employee shall not be reduced to a sum less than seventy-eight percent of what the employee would have received within that month if no attorney's fee were payable.

452 Code Mass. Regs. § 1.02, provides definitions of certain terms used in this statute:

> Cash Award as used in M.G.L. c. 152, § 13A(10), shall mean any specific compensation benefits payable under M.G.L. c. 152, § 36 or § 36A. . . .
>
> Amount Payable to the Employee Within the First Month from the Date of the Voluntary Payment, Order or Decision as used in M.G.L. c. 152, § 13A(10), shall mean any compensation due the employee under the terms of the voluntary payment, order or decision pursuant to M.G.L. c. 152, § 36 or § 36A and any future weekly benefitspursuant to M.G.L. c. 152 due the employee for the first 30 days subsequent to the date of execution of a voluntary payment or the issuance of an order or decision.

Green's Case, 52 Mass. App. Ct. 141, 144 (2001). We conclude that in the circumstances presented, the employee has failed to meet that burden.

Relying exclusively[5] on this board's decision in Sullivan v. Boston University, 11 Mass. Workers' Comp. Rep. 406 (1997), the employee contends that the *only* benefits subject to the 22% reduction for fee provision of § 13A(10) are weekly incapacity benefits attributable to that time period, i.e., within the first month from the date of the hearing decision. The employee's reliance is misplaced, as the sole issue in Sullivan was whether the 22% reduction could properly be applied to a large *retroactive* hearing award of *weekly incapacity benefits*. Following the "guidance of the definitional regulation, 452 C.M.R. 1.02[sic]," the board concluded it could not. Id. at 408. Application of the regulation to a § 36 award was not at issue.[6]

We follow the same guidance and conclude the judge properly construed and applied both the statute and the regulation. In our view, the challenged definition, and the related definition of "Cash Award" in 452 Code Mass. Regs. § 1.02, are simply an attempt to clarify what is meant by two phrases contained in, but not further explained by, § 13A(10). In general,

---

[5] Employee's counsel appended to his brief a copy of a decision recently filed by another administrative judge, in a different case, purportedly addressing the same issue as presented here. This is entirely improper, as the decision has no precedential value and is outside the evidentiary record before us. Moreover, we take judicial notice of the fact that the decision is currently pending before the reviewing board. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3. We have not considered that decision in this appeal, and we caution employee's counsel to refrain from such improper appellate practice in the future.

[6] Although beyond the scope of the issue presented by the self-insurer's appeal, the reviewing board stated, in dicta:

> We leave for another day the regulation's inclusion of § 36 and § 36A awards within the scope of coverage by § 13A(10). We do note in passing, however, that the analysis of that issue might be distinguishable, as a § 36 claim is a "separate and distinct claim of a different nature" from weekly incapacity benefits. Maloof's Case, 10 Mass. App. Ct. 853, 854 (1980).

Sullivan at 408 n.1. That day has arrived.

the purpose of the Massachusetts Workmen's [sic] Compensation Act is to compensate an injured employee for the impairment of his earning capacity. However, § 36 recovery for specified injuries is an exception, providing for payment *in addition to all other compensation*. Vounisea's Case, 3 Mass. App. Ct. 133, 134 n.3 (1975). (Emphasis added.) It has been suggested that the restriction, in the definition of "Amount Payable to the Employee," to *future* weekly benefits due within the first thirty days may not be consistent with legislative intent, as signalled in the language of § 13A(10). The regulation was thought to have been "designed to discourage insurers from letting a large retroactive benefit payment accrue solely to shift to the employee the entire attorney fee burden." L.Y. Nason, C.W. Koziol & R.A. Wall, Workers' Compensation §24.3, at 270-271 (3d ed. 2003).

No such concern affects claims under § 36 and § 36A. The adjudicatory rules require that the specific monetary value of the benefit award claimed be identified, and that the claim be accompanied by a physician's report attesting to the percent of permanent functional loss and/or describing the nature and quality of scarring or disfigurement. 452 Code Mass. Regs. § 1.07(2)(i). Thus, the value of any potential award under § 36 or § 36A is capped by the amount the employee specifies -- nothing the insurer does can increase the maximum amount subject to the 22% fee deduction. We consider the inclusion of those specific benefits in the two challenged definitions as a legitimate counter-balance to the "first thirty days of future weekly benefits" restriction, and reject the employee's argument that the regulation is invalid. The judge did not err in upholding that regulation to deny the employee's § 8(1) penalty claim.

Whether the Employee Prevailed under § 13A(5)

Only the employee appealed the § 10A conference order, and at hearing he did not succeed in his claim for greater § 36 benefits than awarded below. Moreover, his quest for penalties under §§ 8(1) and 14 was denied. Thus, as the word is used in § 13A(5),[7] and construed in 452 C.M.R. § 1.19(4),[8] the employee did not "prevail."

---

[7] General Laws c. 152, § 13A(5), as amended by St. 1991, c. 398, § 35, provides:

> Whenever an insurer files a complaint or contests a claim for benefits and then either (i) accepts the employee's claim or withdraws its own complaint within five days of the date set for hearing pursuant to section eleven; or (ii) the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney in an amount equal to three thousand five hundred dollars plus necessary expenses. An administrative judge may

Case law, however, provides a broader definition of "prevail," beyond what monetary benefits are won or retained. "[T]he employee falls within the typical 'prevailing party' formulation of one who succeeds on any significant litigation issue, achieving 'some of the benefit' sought in the controversy." Connolly's Case, 41 Mass. App. Ct. 35, 38 (1996)(insurer's cross-appeal of conference order placed all benefits awarded to employee at risk, exposing employee to possible recoupment; employee prevailed in hearing decision by retaining benefits awarded at conference), quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978). See also, Conroy's Case, 61 Mass. App. Ct. 268, 274 (2004)(where insurer's modification/discontinuance complaint was denied at conference, and insurer did not limit time period for which it sought reduction or termination of weekly incapacity benefits, employee prevailed at hearing by retaining some benefits paid under conference order); Cruz's Case, 51 Mass. App. Ct. 26, 28 (2001)(although insurer succeeded in modification complaint, employee prevailed at hearing because judge found ongoing causal relationship, which insurer had disputed). Cf. Green's Case, supra(employee did not prevail because, in absence of appeal by the insurer, employee's appeal did not place in jeopardy partial incapacity benefits awarded at conference and retained in hearing decision); Gonzalez's Case, 41 Mass. App. Ct. 39 (1996)(employee did not prevail when judge found an industrial injury occurred, but did not award benefits).

Moreover, an employee who successfully defends against an insurer's § 14(2)[9] fraud complaint has prevailed, for purposes of an attorney's fee. Richards's Case, 62 Mass. App. Ct. 701

> increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.

[8] 452 Code Mass. Regs. § 1.19(4), provides:

> In any proceeding before the Division of Dispute Resolution, the claimant shall be deemed to have prevailed, for the purposes of M.G.L. c. 152, § 13A, when compensation is ordered or is not discontinued at such proceeding, except where the claimant has appealed a conference order for which there is no pending appeal from the insurer and the decision of the administrative judge does not direct a payment of weekly compensation or other compensation benefits exceeding that being paid by the insurer prior to such decision; or. . . .

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

(2004)(denial of insurer's § 14 fraud complaint an unequivocal and unambiguous success on a significant litigation issue, as employee avoided thousands of dollars of costs and penalties and criminal prosecution). See also, Talbot v. Stanton Tool & Mfg., Inc., 11 Mass. Workers' Comp. Rep. 528, 530 (1997). Such case law was recently codified in 452 Code Mass. Regs. § 1.19(5), as amended effective March 21, 2008, which provides, in pertinent part: " For purposes of M. G. L. c. 152, § 13A(5), the employee shall be deemed to have prevailed when an insurer's § 14 fraud complaint is denied and dismissed." In this case, however, the employee was not confronted with a § 14(2) fraud complaint by the self-insurer, but rather a complaint of unreasonable prosecution of a claim (his cervical injury claim) under § 14(1). The employee acknowledges this distinction but argues that "[w]hat applies explicitly to § 14(2) fraud claims should also apply implicitly to § 14(1) frivolous claims. Otherwise the regulation makes no sense." (Employee br. 11.) We do not agree that the plain language of 452 Code Mass. Regs. § 1.19(5) invites such an interpretation. The regulation speaks to "an insurer's fraud complaint." Nowhere in the provisions of § 14(1) is there a reference, explicit or implicit, to fraud.

The Appeals Court, however, has provided guidance on this issue. In Johnson's Case, 69 Mass. App. Ct. 834 (2007), the court vacated so much of the reviewing board's decision, Johnson v. Washington Park Corp., 19 Mass. Workers' Comp. Rep. 356 (2005), as vacated the award of a § 13A(5) hearing fee based on its vacating a § 8(1) penalty award below. The court noted that in response to the employee's original claim, the insurer had "filed a claim under G. L. c. 152, § 14 ,

---

> If it is determined that in any proceeding within the division of dispute resolution, a party, including an attorney or expert medical witness acting on behalf of an employee or insurer, concealed or knowingly failed to disclose that which is required by law to be revealed, knowingly used perjured testimony or false evidence, knowingly made a false statement of fact or law, participated in the creation or presentation of evidence which he knows to be false, or otherwise engaged in conduct that such party knew to be illegal or fraudulent, the party's conduct shall be reported to the general counsel of the insurance fraud bureau. Notwithstanding any action the insurance fraud bureau may take, the party shall be assessed, in addition to the whole costs of such proceedings and attorneys' fees, a penalty payable to the aggrieved insurer or employee, in an amount not less than the average weekly wage in the commonwealth multiplied by six. . . .

Additionally, § 14(3) provides for criminal prosecution, imprisonment, fines and restitution orders.

requesting costs and penalties against Johnson for allegedly bringing his § 8(1) penalty claim without reasonable grounds." Id. at 836. (Emphasis added).[10] Because the reviewing board had not considered the employee's possible entitlement to a § 13A attorney's fee based on the denial of the insurer's § 14 claim,[11] the court remanded the case to the board to do so.[12]

Plainly the panoply of penalties and punishments provided in §§ 14(2) and (3) are greater than those in § 14(1). Nonetheless, we conclude that when an employee avoids the potential assessment of "the whole costs of the proceeding" by defending against and defeating an insurer's § 14(1) claim, the employee has achieved success on a significant litigation issue, and therefore has prevailed for purposes of a § 13A(5) attorney's fee.

Accordingly, we recommit this case to the administrative judge to determine, under all the circumstances, the appropriate amount of that attorney's fee. In all other respects, the decision is affirmed.

So ordered.

_____

Patricia A. Costigan
Administrative Law Judge

_____

William A. McCarthy
Administrative Law Judge

[10] Although the Appeals Court quoted § 14(2) and cited to Richard's Case, supra at 705-706, both of which address a complaint of fraud, Johnson's Case, supra at 835-836 n.4, 840, it is evident from the court's recital of the facts, and from the reviewing board's decision, that the insurer's claim was under § 14(1).

[11] The § 14 claim was denied in the § 10A conference order, and the insurer did not appeal. Johnson's Case, supra at 837.

[12] The remand was rendered moot when the case, including the issue of the § 13A(5) fee, was resolved by lump sum settlement under § 48.

_____

Bernard W. Fabricant
Administrative Law Judge

Filed: November 30, 2009