

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 009419-07

Robert Blanchette
Town of Marblehead
MIAA Workers' Compensation

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Horan)

The case was heard by Administrative Judge Herlihy.

APPEARANCES

Robert L. Noa, Esq., for the employee at hearing
James N. Ellis, Sr., Esq., for the employee on appeal
Joseph J. Durant, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

HARPIN, J. The employee appeals from a decision denying and dismissing his claim for benefits, due to his failure to submit an agreed-upon payment of one-half of the impartial examiner's fee. We affirm the decision.

This case has a long history at the department related to an April 10, 2007 work injury.¹ The issue before us now is the dismissal of the employee's claim for

¹ In an August 4, 2008 decision, an administrative judge awarded §§ 34 and 35 benefits. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file). The employee appealed, and we summarily affirmed the decision on August 18, 2009. The employee appealed to the Appeals Court, which affirmed the decision on July 21, 2010. See Blanchette's Case, 77 Mass.App.Ct. 1111 (2010)(Memorandum and Order Pursuant to Rule 1:28), *rev. den.*, 458 Mass. 1107 (2010). Subsequently, the employee brought a claim for §§ 36 and 30 benefits, which was heard by a different administrative judge. In a January 28, 2011 hearing decision, that judge denied the claim, and the employee appealed. We recommitted the case for further findings. See Blanchette v. Town of Marblehead, 25 Mass. Workers' Comp. Rep. 347 (2011). Following remand, the judge made further findings and issued a Recommended Decision on November 7, 2011. The employee appealed, and we summarily affirmed the decision on April 19, 2012. The employee then appealed to the Appeals Court and that court affirmed the decision on April 23, 2013. See Blanchette's Case, 83 Mass. App. Ct. 1126 (2013)(Memorandum and Order Pursuant to Rule 1:28).

psychological impairments allegedly related to that date of injury. (Dec. 2.) A conference order denying the claim was issued by the prior judge on July 18, 2011, from which the employee appealed to a hearing. (Dec. 2.) At the first scheduled hearing on January 30, 2013, the prior judge found the § 11A impartial medical report to be adequate, but opened the record due to medical complexity. (Tr. I, 18-19, 22.)² She then stayed the proceedings, pending the Appeals Court decision on the employee's appeal of her April 19, 2012 hearing decision. (Tr. I, 39.) The Appeals Court affirmed her decision on April 23, 2013. (See n.1, supra.)

For administrative reasons the present judge was then assigned to the claim. On April 16, 2014, the judge informed the parties that the prior impartial physician was "taking a hiatus" due to his own medical issues, and that a new impartial physician would be assigned, either by agreement or by the Impartial Unit. (Dec. 2; Tr. II, 3.) On June 10, 2014, the employee's counsel agreed to a new impartial physician, to be assigned by the Impartial Unit. (Tr. II, 4.) At a status conference the parties agreed to split the \$650.00 fee for the new § 11A examination. (Dec. 2; Tr. II, 5.) Although the insurer has paid its \$325.00 share of the fee, the employee has not, as of the date of this decision. Id.

Nevertheless, on July 14, 2014 the new impartial physician examined the employee and wrote a report, which he sent to the Impartial Unit. (Dec. 2; Tr. II, 5.) That report was never released, due to the lack of payment by the employee of his share of the fee. (Dec. 2; Tr. II, 6.) At a status conference on September 22, 2014, the judge noted that she rescheduled the hearing to November 18, 2014. (Tr. II, 7.) In regard to the fee, the following colloquy occurred:

Judge Herlihy: In the event that that half fee is not paid for Doctor Kahn's report, I will deny and dismiss this claim. It would be for failure to prosecute and to continue. Attorney Noa, do you deny that the employee has agreed to pay half that fee for Doctor Kahn?

² The transcript of the January 30, 2013 hearing before the prior judge is designated as "Tr. I.") The transcript of the hearing before Judge Herlihy on September 22, 2014, is designated as "Tr. II," that on November 18, 2014, as "Tr. III," and that on December 23, 2014, as "Tr. IV."

Attorney Noa: No. Your Honor accurately read the e-mail chain and my comments to you.
(Tr. II, 7.)

On November 18, 2014, the employee's counsel presented an Affidavit of Indigency and Request for Waiver of Fees, dated October 30, 2014, which had not yet been filed with the Director of the department.³ (Dec. 3; Tr. III, 4.) The employee's counsel and the judge once again addressed the agreement to pay the fee.

Judge Herlihy: Once again, is it true that you had agreed to pay half the fee?

Attorney Noa: Yes, Your Honor. Mr. Durant and I agreed that because of the unavailability of Doctor Mondale that he'd go back into the queue for a random assignment to another 11A.

(Tr. III, 4.) The judge then continued the claim for another month, to December 22, 2014, to allow time for the Director to rule on the Request for Waiver of Fees. (Dec. 3; Tr. III, 12.) If the request was denied and the employee did not pay his share of the fee, the judge stated she would "deny and dismiss this case on [December] 22nd. I will go on the record with the parties and it is gone." (Tr. III, 12.)

The Director denied the request on December 9, 2014, and denied the employee's e-mail request for reconsideration on December 22, 2014. (Dec. 3; Director's Notice Regarding Reconsideration, Ex. 1.)

On December 23, 2014, at a status conference, the Director's denial of reconsideration was entered into the record. (Tr. IV, 3.) The insurer then moved for denial and dismissal of the claim, which the judge granted. (Dec. 3; Tr. IV, 11.) The

³ The Director rules on any fee waiver request. See 452 Code Mass. Regs. § 1.11(1)(a) ("A request for a waiver of the requisite fee based on indigence shall be filed with the commissioner on a form prescribed by the Department not later than ten calendar days following the filing of the appeal.") The granting of a fee waiver is at the Director's discretion. A party's Form 136 waiver request "may be granted" after applying the standards set forth in SJC Rule 3:10. See Circular Letter 282, Standards and Procedures For § 11A(2) Fee Waiver Requests, paragraph (2), dated April 26, 1996, implemented following Neff v. Commissioner of the Dept. of Industrial Accidents, 421 Mass. 70 (1995).

judge followed that oral ruling with a written decision on February 26, 2015, in which she reviewed the history of the case and reiterated her order that the claim be denied and dismissed. (Dec. 4.) The employee filed a timely appeal.

The employee argues the Director's denial of his fee waiver petition was an abuse of discretion and a violation of his due process rights. (Employee br., 9-14.) He requests that we vacate the decision of the judge, with "the matter recommitted for further consideration of the merits of the employee's fee waiver request based upon his proven indigence." (Employee br. 14.) The insurer responds by noting that the employee's counsel agreed several times to payment of one-half of the fee for a new impartial physician's examination, and that having done so, he cannot now "backtrack on the very agreement voluntarily entered into" (Ins. br., 4.)

What both parties miss is that we lack the statutory authority to review any decision of the Director. G. L. c. 152, § 11C; Suliveres v. Durham School Service 24 Mass. Workers' Comp. Rep 49, 52 n.6 (2010) (review of ruling of Commissioner denying employee's request for late appeal of hearing decision outside of reviewing board's statutory authority), *aff'd. sub nom, Suliveres's Case*, 78 Mass.App.Ct. 1126 (2011)(Memorandum and Order Pursuant to Rule 1:28), *fur. app. rev. denied*, 459 Mass. 1109(2011). We thus have no authority to determine if the Director's decision denying the employee's request for a waiver of his portion of the impartial's fee was an abuse of discretion. The employee's request that we do so is denied.

The employee, despite having been given a number of opportunities by the judge to pay the half of the fee that his counsel had already agreed to pay,⁴ did not do so, even when informed by the judge that failure to pay the half fee or obtain a waiver of the fee from the Director would result in the denial and dismissal of his claim. (Tr. III, 12.) Notably, what is not before us in this appeal is whether the judge was arbitrary or capricious in dismissing the employee's claim for a failure to prosecute, due to the lack of a second impartial physician's report. The prior judge had already ruled that the matter

⁴ A client is bound by the acts of his attorney in the course of litigation. Burt v. Gahan, 351 Mass. 340, 342-342 (1966).

was complex and allowed the parties to submit their own medical reports and records. (Tr. I, 18-19, 22.) All the employee raises here is whether the Director's denial of his request for a fee waiver was an abuse of discretion. All other issues that could have been raised are therefore waived. Dennen v. Addison Gilbert Hospital, 5 Mass. Workers' Comp. Rep. 289, 292 n.4 (1991).

The decision denying and dismissing the employee's claim is affirmed.

So Ordered.

William C. Harpin
Administrative Law Judge

Filed: **August 22, 2016**

Mark D. Horan
Administrative Law Judge

Administrative Law Judge
Bernard W. Fabricant