COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 047014-05**

Robert Cram	Employee
Ellis & Associates	Third Party Claimant
Nasco, Inc.	Employer
American Zurich Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant, and Calliotte)

The case was heard by Administrative Judge Rose.

APPEARANCES
Teresa Brooks Benoit, Esq., for the third party claimant at hearing
James N. Ellis, Esq., for the employee on appeal
John J. Canniff, Esq., for the insurer

KOZIOL, J. The employee, Robert Cram, appeals from an April 9, 2014, hearing decision denying and dismissing his attorney's third party claim for costs. We allow the insurer's motion to dismiss the appeal with prejudice. Because the claim's extensive procedural history has bearing on our ruling, we must recount it.

The employee sustained a work-related injury to his right knee on October 16, 2005. (Tr. II, 2.)[1] On December 12, 2008, the employee filed a claim seeking payment of $747.69 representing § 36(1)(g) benefits for a loss of function to his right lower extremity. (Dec. II, Ex. 12.) The claim form also sought payment of

[1] Three hearing decisions have been filed pertaining to issues relating to this industrial accident: October 29, 2008, October 26, 2009, and April 9, 2014. The October 29, 2008 hearing decision, ordered the insurer to pay the employee § 35 benefits and § 35A dependency benefits for three dependents, from April 28, 2006, and continuing, and an attorney's fee of $5,233.64, plus reasonable expenses. (Dec. II, 3; Dec. II, Ex. 12.) The last two decisions, October 26, 2009 and April 9, 2014, concern the claim for an order of payment against the insurer for the cost of a physician's report filed as an attachment to the employee's claim for loss of function benefits. Because we will discuss those decisions, we refer to the October 26, 2009 decision as "Dec. I," and the April 9, 2014 decision and its hearing transcript, as "Dec. II and Tr. II," respectively.

attorney's fees pursuant to § 13A. Within twenty-one days of receiving the claim, the insurer paid the employee the full amount of the § 36 benefits claimed.

The employee maintained, however, that the insurer owed him $700, representing the fee his examining physician, Dr. Errol Mortimer, charged for drafting the report that was appended to his claim for § 36(1)(g) benefits. See G. L. c. 152, § 10(1)("No attorney's fee shall be due for services involving claim for loss of function or disfigurement under section thirty-six unless such claim includes a copy of a letter from a physician describing the location and extent of the alleged loss of function or disfigurement and the specific amount requested for compensation thereof"). At conference, a different administrative judge, Judge Murphy, denied the employee's claim for payment of the cost of Dr. Mortimer's report, and the employee appealed. (Dec. I; Dec. II, Ex. 8.) The matter proceeded to a hearing de novo before Judge Murphy on September 1, 2009, at which time the parties submitted stipulated facts. Id.

On October 23, 2009, the employee's attorney filed a "Motion to Substitute Third Party Claim of Counsel for Costs in Place of the Pending Employee's Claim for Costs." (Dec. II, Ex. 9.) The motion sought permission to substitute a third party claim filed on October 16, 2009, by Ellis & Associates, for the employee's claim that had been heard by the judge. Id. The sole reason proffered in support of the motion was the allegation that, "[Ellis & Associates] is the real party in interest, having advanced the costs in question." Id. The judge denied the motion to substitute claims. Id.

On October 26, 2009, Judge Murphy issued her decision denying and dismissing the employee's claim for costs. (Dec. II, Ex. 8.) In doing so, she found the insurer's payment of the claim within twenty-one days rendered inapplicable, the provisions of § 13A that require the insurer to pay the employee's attorney's fee and expenses; therefore, no expenses were due to the employee. Id. The judge also found:

> there was no evidence presented as to the reasonableness of the expense sought. I do not infer that the expense is reasonable and instead find that the Employee has failed to meet his burden of proving reasonableness. The Employee's claim fails.

Id.

Thereafter, on November 11, 2009, Attorney James Ellis filed an appeal from the judge's decision as a "3rd Party Lien Holder." (Dec. II, Ex. 20.) No appeal was filed by, or on behalf of, the employee.[2] On February 12, 2010, the insurer moved to dismiss the appeal on the ground that Attorney Ellis did not have standing to maintain the appeal.[3] On February 22, 2010, we allowed the insurer's motion to dismiss the third party claimant's appeal without prejudice. (Dec. II, Ex. 6.) Attorney Ellis then sent the following request for reconsideration to this board:

> This matter was heard at a pre-trial conference before you at which time the Insurer made a motion to dismiss based upon the fact that this was a claim on behalf of the EEE [sic] and that the EEE [sic] had sent a letter supposedly discharging this office back in January. As the actual status of a representation was not known we ask that if in fact were [sic] the case this case be converted into a third party claim instead. However, the Employee has re-affirmed the fact that this office continues to represent him. I enclose a copy of that notice dated February 19, 2010. Kindly reconsider the motion to dismiss as it appears to be based upon erroneous understanding of current representation status of the Employee which is presently with this office, thus making the original claim on behalf of the Employee still valid and continues to be the claim that was heard before Judge Murphy.

---

[2] In addition, no Form 114 was filed indicating Attorney Ellis was seeking to withdraw from the case, or that the employee had discharged Attorney Ellis. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file.)

[3] The insurer argued: 1) the underlying claim was filed in the employee's name "because that was the only way that a potential entitlement to a § 13A attorney's fee could be maintained and/or generated"; 2) although an attorney's lien filed pursuant to G.L. c. 221, § 50, is against the employee, attorney Ellis would not acknowledge whether he still represented the employee, and he could not be both the employee's advocate and adversary; and, 3) the judge below denied counsel's request to substitute his claim for the employee's claim, leaving the employee as the only proper party to the action. (Dec. II, Ex. 7.)

(Dec. II, Ex. 19.)[4] The insurer filed an objection to the motion to reconsider. (Dec. II, Ex. 5.) On March 12, 2010, we denied the motion to reconsider our dismissal of the third party claimant's appeal. (Dec. II, Ex. 4.)

On January 18, 2012, Attorney Ellis filed a third party claim against the insurer, seeking payment of the cost of Dr. Mortimer's report. The claim was denied by a second administrative judge at conference, and Attorney Ellis appealed. Subsequently, the matter was assigned to Judge Rose for a hearing.

At the hearing, Attorney Ellis filed a Form 161, Third Party Claimant Hearing Memorandum seeking "700.00 costs of Dr. Mortimer." (Dec. II, Ex. 1.) The insurer's Form 162, hearing memorandum denied "13A(3) fee and expenses, specifically $700 medical report expense. 10(1)." (Dec. II, Ex. 2.) On the record, the insurer also raised the issue of res judicata, asserting that the employee's failure to appeal from Judge Murphy's decision denying his request that the insurer pay for the expense of Dr. Mortimer's report resolved all the pending issues. (Tr. II, 25-38.)

At the hearing, no testimony was taken. (Tr. II.) The parties submitted their exhibits and stipulated facts and the judge requested briefs addressing the issues. (Tr. II, 38-39.) On April 9, 2014, the judge issued his hearing decision denying and dismissing Attorney Ellis's claim. (Dec. II, 4.) The judge determined that, "Under Chapter 152, § 13A attorney's fees and expenses are

---

[4] Although the request for reconsideration was filed with an attachment, the hearing exhibit did not include the attachment. (Dec. II, Ex. 19.) The attachment consisted of a single page, appearing to be a photocopy of a pay stub from "Transport Distribution & Delivery" for "Robert Cram" with the following hand-written notation at the top:

> 508-752-2631
> AttN' CELIA CARVALHO
>
> Please note that Ellis & Assoc will be handling my claim again Effective Immediately 2-19-10[.]

This was followed by a signature, "Robert Cram." Rizzo, supra.

inextricably intertwined, and Chapter 152 contains no separate provision solely for attorney expenses." (Dec. II, 4.) Relying in part on our decision in Mike v. Zebra Striping & SealCoat, 24 Mass. Workers' Comp. Rep. 307, 309-310 (2010), the judge concluded, "[t]he present claim is contrary to the statutory scheme, the C.M.R., and case law." (Dec. II, 4.) Lastly, the judge found that he "is not persuaded that the proper party is counsel as our ethical rules indicate any such expenses are a loan from counsel to the client. The employee's remedy lies with the legislature." Id.

Attorney Ellis filed a notice of appeal from Judge Rose's hearing decision on behalf of "the Employee." On July 25, 2014, Attorney Ellis filed a reviewing board brief entitled "Brief of the Employee, Robert Cram" in which he recounted only the procedural history of the employee's claim as it progressed before Judge Murphy, not the history of Attorney Ellis's third party claim before Judge Rose. Attorney Ellis sought relief on behalf of the employee, not Ellis & Associates as third party claimant. (Employee br. 5-7, 17.) On August 14, 2014, the insurer filed: 1) a response brief addressing the substantive issues raised in the "employee's brief," (Ins. br. 1-11); and, 2) a "Motion to Dismiss § 11C Appeal," seeking to dismiss the appeal because the employee was not a party to the litigation before Judge Rose and the third party claimant, Attorney Ellis, failed to file a timely appeal of Judge Rose's hearing decision.

On August 29, 2014, Attorney Ellis filed a "Reply Brief of the Employee, Robert Cram" wherein he again recounted only the history of the employee's claim before Judge Murphy, not any of the third party claimant's proceedings before Judge Rose. (Employee Reply br. 5-7.) The reply brief argued in part, "Attorney Ellis has privity as well as a legal interest in this action through his valid and enforceable Attorney's Lien, which requires the Insurer to reimburse him for the expenses associated with the claim;" therefore, the "Attorney has

standing to assert his lien."[5] (Employee Reply br. 14-15.) Yet the reply brief's conclusion states, "the Employee respectfully contends the hearing decision of Judge Rose should be reversed and remanded." (Employee Reply br. 16.) In closing, Attorney Ellis reaffirmed that the brief was submitted on behalf of the Employee, Robert Cram, not Ellis & Associates as third party claimant. Id.

Attorney Ellis has not asserted that he committed scrivener's errors by filing a notice of appeal from Judge Rose's decision on behalf of the "Employee," as well as his reviewing board brief and reply brief on the employee's behalf. In addition, Attorney Ellis has not asserted that he petitioned the Director of the Department for permission to file a late appeal on his own behalf, as third party claimant, pursuant to § 11C.[6] The fact remains that the employee was not a party to the proceeding before Judge Rose. (Tr. II, 35-36.) As such, he had no ability to appeal from Judge Rose's decision denying Attorney Ellis's third party claim. We therefore allow the insurer's motion to dismiss the appeal with prejudice.

We make one last observation. Our requirement that the appeal be filed by the proper party in interest is not a matter of elevating form over substance. Indeed, as counsel for Ellis & Associates admitted to Judge Rose, Attorney Ellis's motion to substitute claims was filed because the employee discharged counsel, a point not conveyed to Judge Murphy in Attorney Ellis's original motion to

---

[5] The "reply brief" also argued that res judicata was inapplicable because "Employee's appeal was dismissed by the Review board 'without prejudice.' Thus the Employee is not precluded from bringing the current claim." (Employee Reply br. 14.)

[6] General Laws, c. 152, § 11C, states 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 [director] 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.

Because more than one year has passed from the date of Judge Rose's decision, during which § 11C provided Attorney Ellis with an avenue of relief from his failure to timely appeal Judge Rose's decision, that option has been foreclosed.

substitute parties. (Tr. II, 12-13; Dec. II, Ex. 9.) Under the circumstances, had we allowed the third party lienholder's appeal from Judge Murphy's decision, we could have been faced with competing claims from both the employee and his former counsel. Once Attorney Ellis resumed representation of the employee, his persistent practice of interchanging his third party claim with the employee's claim appears to be have served no purpose other than to obfuscate the identity of the party in interest, confusing and prolonging proceedings that could have, and should have, concluded years ago by the simple act of filing an appeal on behalf of the employee, from Judge Murphy's October 26, 2009 decision.[7] The employee's appeal from Judge Rose's April 9, 2014 decision is hereby dismissed with prejudice.

So ordered.

_____

Catherine Watson Koziol
Administrative Law Judge

_____

Bernard W. Fabricant
Administrative Law Judge

[7] We observe that our regulations permit the employee and his attorney to "agree on a retainer, but only to pay for necessary and reasonable expenses and disbursements related to his representation." 452 Code Mass. Regs. § 1.19(2). There was no testimony about the employee's fee arrangement with Attorney Ellis, and Attorney Ellis refused to submit his fee agreement, despite being requested to do so by the insurer. (Tr. II, 31-32.) In any event, putting aside the issue of whether Attorney Ellis has a valid lien pursuant to G. L. c. 221, § 50, Attorney Ellis's admission that he was in privity with the employee regarding the underlying claim that was tried before Judge Murphy, means that he was barred from re-litigating the underlying substantive claim against the insurer before Judge Rose. LaRoche v. G & F Industries, 27 Mass. Workers' Comp. Rep. 51, 53-54 (2013) (claim preclusion applies where there is an identity of parties or their privies and the actions are based on the same claim), and cases cited. As noted supra, Judge Murphy found no statutory or regulatory support for the employee's claim against the insurer and made findings of fact that the employee failed to meet his burden of proving the claimed expense was reasonable. (Dec. I, 4; Dec. II, 3.) Any issues concerning Judge Murphy's decision were waived when the employee failed to appeal from her decision.

_____
Carol Calliotte
Administrative Law Judge

Filed: ***August 20, 2015***