COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 044894-91**

Satwant Saini	Employee
Jeffco Fibers, Inc.	Employer
One Beacon Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Harpin and Horan)[1]

This case was heard by Administrative Judge Taub.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Brian T. Dougan, Esq., for the insurer

HARPIN, J. The employee appeals from a decision dismissing his claim for medical benefits due to his failure to pay the appeal fee, as required by G. L. c. 152, § 11A(2).[2] We affirm.

The employee, after sustaining a work injury on July 30, 1991, settled his accepted liability case for $145,000 on June 12, 1996. Eleven years later, on August 14, 2007, he filed a claim for payment of medical bills. On November 7, 2007, the administrative judge issued a conference order denying the claim. (Dec. 2; Ins. Ex. 2.) The employee filed a timely appeal of the August 14, 2007 conference order, but not the requisite fee

[1] Judge Levine, originally a member of the panel, has retired.

[2] General Laws c. 152, § 11A(2), provides in pertinent part:

> When any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order pursuant to section ten A, the parties shall agree upon an impartial medical examiner from the roster to examine the employee and submit such choice to the administrative judge assigned to the case within ten calendar days of filing the appeal, or said administrative judge shall appoint such examiner from the roster. The insurer or any claimant represented by counsel who files such appeal shall also submit a fee equal to the average weekly wage in the commonwealth at the time of the appeal to defray the cost of the medical examination under this section within ten days of filing said appeal . . . .

mandated by § 11A(2). (Dec. 2.) On November 20, 2007, notice was sent to the employee's attorney notifying him that the appeal fee was overdue. (Dec. 2.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice taken of board file). On December 22, 2008, the case was withdrawn administratively due to the employee's failure to pay the required fee. (Dec. 2, 3.)

On December 24, 2008, the employee's attorney sent a letter to the judge complaining about the administrative withdrawal. (Dec. 2.) The judge, in an April 24, 2009 letter sent to both parties, explained that the insurer did not agree to waive the impartial exam in the conference memorandum, as it crossed out the employee's checking of the box marked "no impartial exam is needed." Id. He also noted that the conference memorandum had the box checked that stated "yes, impartial exam will be needed." Moreover, the judge noted that no "opt out" (of the impartial examination) form was submitted. "There being a need for an examination by an impartial physician, an appeal fee to compensate the impartial physician was required of any party appealing the conference order." (Dec. 2; Ins. Ex. 3.)

The employee filed a second claim for payment of medical bills on June 3, 2009, which was withdrawn by a conciliator on August 12, 2009. (Dec. 3.) The employee's attorney sent a letter to the then-commissioner[3] protesting the withdrawal by the conciliator. Id. The commissioner informed the employee's attorney that the appeal should have been directed to the senior judge, not the commissioner. (Dec. 3; Ins. Ex. 4.) On October 26, 2010, the employee filed, for a third time, the same claim for payment of medical bills, which was again withdrawn by a conciliator. (Dec. 3.) This time the employee's attorney appealed to the senior judge, who, on April 30, 2012, issued a memorandum of disposition, stating that the conciliator lacked the authority under § 10(1) to withdraw the claim on res judicata grounds. Id. He then sent the claim forward to the judge for a conference. Id. On July 19, 2012, the judge denied the claim.

[3] An Act Reorganizing the Executive Office of Labor and Workforce Development, St. 2011, c. 3 § 152, amended G. L. c. 152, § 1(1A), by striking the words "commissioner of" and replacing them with "director of the department."

Id. The employee appealed and the matter was scheduled for a hearing on May 2, 2013. Id.

In a hearing decision issued on July 31, 2014, the judge denied and dismissed the employee's claim, on the ground that it was the same claim for payment of medical bills that had been submitted in November, 2007, which was denied in a November 7, 2007 conference order. (Dec. 5.) The judge held the employee's failure to perfect his appeal of that denial, by paying the requisite § 11A fee, and the subsequent withdrawal of the claim by the department, amounted to an acceptance of that order under § 10A(3).[4] Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep. 415, 418 (2009)(failure to appeal amounts to an acceptance of the conference order). The judge concluded that the doctrine of res judicata precluded the employee from re-litigating the exact same issue. (Dec. 5.)

The employee first argues there was no medical dispute at issue at the conference in 2007, and therefore an impartial examination under § 11A was unnecessary. However, as the judge noted in the decision, the conference memorandum, signed by both parties, had the box marked "No Impartial Exam is needed" crossed out and an "X" put in the box marked "Yes, Impartial Exam Will be needed." (Dec. 2; April 24, 2009 letter of judge; Conference Memorandum dated November 6, 2007.) On the second page of the Memorandum, the initials "N/A" next to "Medical Specialty of Impartial

[4] General Laws c. 152, § 10A(3) states:

> Any party aggrieved by an order of an administrative judge shall have fourteen days from the filing date of such order within which to file an appeal for a hearing pursuant to section eleven. Such hearing shall be held within twenty-eight days of the department's receipt of such appeal.
>
> Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings, except that a party who has by mistake, accident or other reasonable cause failed to appeal an order within the time limited herein may within one year of such filing petition the commissioner of the department who may permit such hearing if justice and equity require it, notwithstanding that a decree has previously been rendered on any order filed, pursuant to section twelve.

Physician" was stricken through and a hand written "orthopedic" was placed on the adjacent line. Rizzo, supra. Despite the employee's later instance in correspondence that "both parties opted out of an impartial examination," (Letter of Attorney James Ellis, dated December 18, 2007, Rizzo, supra), and in Attorney Ellis' December 24, 2008, letter to the judge that "[t]he notes in my file reflect that an opt out form was submitted by the parties," no such separate form is contained in the board file. (Dec. 2.)

The time for the employee to assert that no § 11A examination was required in this case was at the conference, when the judge could have ruled on the issue. We cannot know what actually was said at the conference,[5] but the conference memorandum stands as evidence of what was agreed to and what issues were raised. Ellingwood v. CLP Resources, Inc., 26 Mass. Workers' Comp. Rep. 89 (2012)(parties bound by representation made in Form 140 conference memorandum). Once having submitted the completed form, the requirement of a § 11A impartial physician's examination was set, and the employee's counsel's later attempt to claim that the parties opted out of it was disingenuous, at best.

The employee also asserts that at the conference the insurer failed to present any conflicting medical evidence countering the claim for payment of the medical bills. (Employee br. 7.) This may have been the case, as a review of the case file shows that the insurer's "Submissions to Impartial Physician" contained a number of the reports, treatment notes, and an operative note of the physician whose bills were sought to be paid by the employee, but only one IME report, that of Dr. Lawrence Shields, which was written ten years before most of the treatment at issue.[6] Rizzo supra. However, a

[5] "No stenographic transcription or electronic recording shall be made of the conference proceeding . . . except that the administrative judge . . . may require such transcription or recording or, with the consent of all parties, may allow any party . . . to make a transcription or recording of the proceedings." 452 Code Mass. Regs. § 1.10(4).

[6] Although the insurer's cover sheet listed the date of Dr. Shields' report as March 9, 2005, which would have placed it after many of the medical records submitted, the date of the actual IME report was ten years earlier, March 9, 1995. Rizzo, supra.

"dispute over medical issues" does not depend on whether or not the insurer submitted specific medical evidence countering the employee's § 30 claim that the medical treatment at issue for payment was "adequate and reasonable," and causally related to her industrial accident. Rivera's Case, 87 Mass.App.Ct. 1134 (2015) (Memorandum and Order Pursuant to Rule 1:28, 2015)(dispute over medical issues does not turn on the nature or strength of the medical evidence at the conference). Moreover, the conference order itself fails to state that the judge found no impartial examination was necessary. 452 Code Mass. Regs. § 1.10(4).

The employee next argues the judge erred in finding the department's administrative withdrawal of the 2007 claim operated as the equivalent of a failure to file a timely appeal or withdrawal of a timely appeal. (Employee br. 7.) The employee asserts the administrative withdrawal was not the equivalent of the withdrawal of a timely appeal, "so as to be deemed acceptance of the Administrative Judge's conference order and findings." (Employee br. 8.) She concludes that the withdrawal had no preclusive effect upon her subsequent claim. (Employee br. 9-10.)

The employee's premise is, in fact, wrong, because the judge did not deem the department's administrative withdrawal of the claim as the equivalent of a party's withdrawal or failure to perfect an appeal. Instead, the judge found something different. "The filing of a defective appeal of the November 7, 2007, [sic] defective because it was not perfected with the filing of the required fee, amounts to a failure to file a timely appeal." (Dec. 5.) In essence, the employee has raised as an issue a matter that does not exist. The administrative withdrawal was merely the result of the failure to perfect the appeal by paying the requisite fee, it was not the cause of it. Id.

In any event, the employee's argument has been considered and rejected by the Appeals Court. In Giraldo's Case, 85 Mass.App.Ct. 1109 (2014)(Memorandum and Order Pursuant to Rule 1:28), rev. denied, 468 Mass. 1106 (2014), the court, on similar facts, affirmed our holding[7] that an employee's failure to timely file the requisite fee

[7] See Giraldo v. Albert's Inc., 27 Mass. Workers' Comp. Rep. 115, 117 (2013).

constituted a failure to appeal. This, the court held, was the equivalent of an acceptance of a judge's conference order. Id.

The Appeals Court dealt with the same issue in Rivera's Case, supra, where it held:

> In the circumstances of the present case, § 10A(3) of the Act provided the department with authority to withdraw the employee's claims administratively for failure to perfect her appeal. Because the claims involved a medical issue (and the conference orders did not state otherwise), it is reasonable to construe the employee's failure to perfect her appeals as the equivalent of a "[f]ailure to file a timely appeal or withdrawal of a timely appeal" sufficient to constitute "acceptance of the administrative judge's order and findings."

Id. The employee's arguments on this point are thus without merit.

The employee next argues the judge erred in finding that res judicata barred the employee from filing a third claim on October 26, 2010, for payment of the same medical bills raised in the first, withdrawn, claim. She asserts the administrative withdrawal of the claim could only be without prejudice, and that because the conference order was not concerned with liability it could not have preclusive effect.

The employee's failure to perfect her appeal of the conference order, which was effectively an acceptance of the judge's order, Giraldo's Case, supra.; Rivera's Case, supra, amounted to a final judgment, to which res judicata (or more properly, issue preclusion) attached. Sanches v. Framingham State Hospital, 21 Mass. Workers' Comp. Rep. 19, 22 (2007)(rule of res judicata narrowly applied so as to conclude only those issues explicitly decided). The employee's reliance on Ellis v. Commissioner of the Dept. of Industrial Accidents, 61 Mass.App.Ct. 902 (2004) is misplaced. In that case the appeal did not involve medical issues and thus there was no requirement for payment of an §11A fee. Here the issue did involve a medical question and the parties did not agree to waive the impartial examination.

The employee also raises § 16,[8] arguing that since initial liability had been decided, a claim for further compensation or discontinuance is not precluded by a prior decision. (Employee br. 12.) Here, however, the conference order has preclusive effect, as the medical bills are the same ones for which the employee sought payment in the two prior claims. While issues such as incapacity and ongoing causal relationship can change over time, and thus further litigation under § 16 is not barred, a claim for benefits that was conclusively resolved in an earlier action is barred. See Hough's Case, 82 Mass. App. Ct. 1121 (2012)(Memorandum and Order Pursuant to Rule 1:28).

The insurer has requested that § 14(1)(b) penalties be assessed.[9] As the Appeals Court has noted,

> Additionally, we take the opportunity to observe that in the field of worker's compensation litigation, the attorney typically knows far better than the client when an appeal is frivolous. Often, it is the attorney and not the client who is the perpetrator of wasted time and effort for both the opposing party and the administrative and judicial decision makers. We repeat our warning that we will not hesitate to award attorney's fees and costs against counsel in appropriate cases.

Hough, supra.

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[8] General Laws c. 152, § 16, provides in relevant part:

> When in any case before the department is appears that compensation has been paid or when in any such case there appears of record a finding that the employee is entitled to compensation, no subsequent finding by a member or the reviewing board discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter or fact or res adjudicate as a matter of law, and such employee … may have further hearings as to whether his incapacity … is or was the result of the injury for which he received compensation.

[9] General Laws c. 152, § 14(1)(b), provides in relevant part:

> 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.

Accordingly, we affirm the decision of the administrative judge and conclude that this appeal has been advanced by employee's counsel without reasonable grounds, in violation of G.L. c. 152, § 14(1).[10] We retain jurisdiction for future assessment of the costs of the proceeding against the employee's attorney pursuant to § 14(1). In order to determine the amount to be assessed upon attorney Ellis, we direct the insurer's attorney to provide him and this board with an affidavit describing the fees and costs incurred by the insurer in defense of the employee's claim. Insurer's counsel shall have twenty days from the filing date of this decision to comply with this order, and employee's counsel shall have twenty days from receipt of the insurer's affidavit to respond in writing. We retain sole jurisdiction of the case of the purpose of deciding the amount due under § 14(1). Holden v. Town of Wilmington, 25 Mass. Workers' Comp. Rep. 165, 170 (2011).

So ordered.

William C. Harpin
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: **November 14, 2016**

[10] The employee's attorney has raised the same arguments presented here in prior cases. In Hough, supra, the court imposed appellate attorney's fees as the "appeal has no merit and qualifies as frivolous within the meaning of [Mass R.A.P.] 25." In Giraldo, supra, no penalty was imposed, although the concurring judge on the reviewing board, citing Hough, would have assessed § 14(1) penalties. Giraldo v. Albert's Inc., supra, at 118 (Horan, concurring). In Rivera's Case, supra, the Appeals Court affirmed similar penalties imposed by the administrative judge. The court noted that "the procedure [the employee's attorney] chose to prosecute such a challenge to the statute (refiling a claim identical to the one previously dismissed, rather than perfecting and prosecuting an appeal from the order he claimed to be incorrect) was improper. The penalties were appropriate." Id. We impose the present penalty for a similar reason.