COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 003332-10**

Scott Marino	Employee
Progression Systems	Employer
Insurance Company State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Horan and Koziol)

The case was heard by Administrative Judge Preston.

APPEARANCES
Michael C. Akashian, Esq., for the employee
Joseph S. Buckley, Esq., for the insurer

HARPIN, J. The insurer appeals a decision awarding medical and § 36 benefits to the employee, as well as an enhanced fee to the employee's counsel. We reverse in part, affirm in part, and recommit for further findings.

The employee was injured in a catastrophic accident on January 26, 2010, while on a business trip in the country of Oman. (Dec. 3; Ex. 1.) The employee sustained a cervical fracture and dislocation when the car in which he was a passenger rolled over. (Ex. 1.) He was rendered tetraplegic immediately, although a definitive diagnosis was not made until several days later in Dubai, where he had surgery. Id. Several weeks later he was flown back to Boston and treated at Massachusetts General Hospital, and then to the Spaulding Rehabilitation Hospital for a long course of physical and occupational therapy. Id. He has been confined to a wheelchair since the accident, with no sensation below the C5 level, no control of his hips or legs, and limited movement in his shoulders and arms. Id.

The employee works full time both nationally and internationally as a "highly educated, accomplished successful corporate executive," but he requires skilled nursing and personal assistance around the clock. (Dec. 4.) When not

sleeping, the employee is mobile in his wheelchair, with the help of his personal assistant. (Dec. 5.)

The employee filed a claim for §§ 13, 30 and 36 benefits, which resulted in a conference order awarding him § 36 benefits in the amount of $297,661.79, for losses of function, scarring, and disfigurement. (Dec. 2; Conference Order[1].) In addition, the judge awarded $16,390.53 for reimbursement of various medications, mileage and parking, but reserved a decision on the employee's claim for in-state and out-of-state nursing care. Id. The insurer filed a timely appeal.

In his decision the judge ordered the insurer to pay for twenty-four hour nursing care/attendance, seven days a week, reiterated his prior award of $297,661.79 in § 36 benefits (including $25,344.00 for scarring and disfigurement), awarded $16,390.53 in nursing and living expenses, and awarded the employee's attorney an enhanced fee of $15,000.00. The insurer appealed, arguing that: the award for scarring and disfigurement under § 36(1)(k)[2] exceeded that sub-section's maximum allowable amount of $15,000.00; certain of the expenses awarded were for non-covered ordinary living expenses; the employee's submissions for mileage reimbursement were not in accord with the applicable regulation; and the $15,000.00 enhanced fee awarded to the employee's counsel was without any support in the record.

In awarding the total of $297,661.79 in specific compensation the judge referred to "the dollar figures stated in the Employee's exhibits," as well as the

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[1] See Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file).

[2] General Laws, c. 152, § 36(1)(k) states:

> For bodily disfigurement, an amount which, according to the determination of the member or reviewing board, is a proper and equitable compensation, not to exceed fifteen thousand dollars; which sum shall be payable in addition to all other sums due under this section. No amount shall be payable under this section for disfigurement that is purely scar-based, unless such disfigurement is on the face, neck or hands.

employee's testimony and the medical opinions. (Dec. 5.) The "exhibits" referred to apparently consisted of an attachment to the conference order, which had been submitted by the employee at the conference to document his claimed § 36 benefits. See 452 Code of Mass. Regs. § 1.07(2)(i)(2) ("All claims for scarring or disfigurement . . . shall be accompanied by . . . a signed written statement by the claimant or the claimant's counsel indicating the specific monetary value of the benefit award being sought.")[3] In that attachment the employee sought the maximum value of $15,000.00 "simply because he's in the wheelchair," along with neck scarring of $3,233.19 and a head scar of $7,111.71. Rizzo, supra. The insurer argues the judge awarded $10,344.00 more than is allowed by § 36(1)(k), as inclusion of payments for scarring, in addition to that for the use of the

[3] That statement was not made part of the record, despite the employee's counsel noting at the end of the hearing:

> Atty. Akashian: I don't know whether we have to submit or we should submit the Section 36 evaluation that were (sic) previously submitted, just to complete the record.
>
> Judge: You folks can decide what you believe you need so that I can author a decision.
>
> Atty. Buckley: Okay.
>
> Atty. Akashian: Can we have a week for that, judge?
>
> Judge: Yes.

(Tr. 56.)

Conference orders and documents submitted at the conference are not part of the hearing record unless specifically admitted into evidence, as the hearing is *de novo*. Berfield, v. North Shore Medical Cntr., 30 Mass. Workers' Comp. Rep. __ (3/31/2016) Rodrigues v. AM-PM Cleaning Corp., 17 Mass. Workers' Comp. Rep. 588, 590 (2003); Grande v. T-Equipment Constr. Co., 10 Mass. Workers' Comp. Rep. 379, 381 (1996). The judge's reference to the "dollar figures in the Employee's exhibits," was thus without a basis in the record, but as the insurer did not raise this issue on appeal, we consider it waived. Dennen v. Addison Gilbert Hospital, 5 Mass. Workers' Comp. Rep. 289, 292 n. 4 (1991).

wheelchair, runs afoul of § 36(1)(k)'s admonition that payment for disfigurement under that section is "not to exceed fifteen thousand dollars." The employee argues that the maximum award applies only to non-scar based disfigurement, and that payment for scar-based disfigurement on the face, neck or hands is in addition to that amount.

This issue has not arisen before, although the question of what constitutes "purely scar-based" has been the subject of a number of cases. See Patnaude v. Dept. of Corrections, 26 Mass. Workers' Comp. Rep. 173 (2012), and Corriveau v. Home Ins. Co., 43 Mass.App.Ct. 924 (1997). When considering such a case of first impression, we look to the language of the statute,

> according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.

Hanlon v. Rollins, 286 Mass. 444, 447 (1934).

The statute begins by noting that "the employee shall be paid the sums hereafter designated for the following specific injuries," G. L. c. 152, § 36(1), followed by eleven sub-sections noting payments for specific body parts. Sub-section (k) notes that the "specific injuries" it covers are "for bodily disfigurement." The last sentence provides that a "purely scar-based" disfigurement will not be paid, unless it is "on the face, neck or hands." This language is not ambiguous, for the "ordinary and approved usage" of the words clearly includes scar-based disfigurements among those bodily disfigurements covered by the sub-section. There is but one category, which includes both scar- and non-scar-based "bodily disfigurements." The limitation on payment under this sub-section to a total of $15,000.00 thus applies to all bodily disfigurements resulting from a single injury. Focht v. Springfield Falcons, 20 Mass. Workers' Comp. Rep. 93, 94 (2006)(maximum amount of § 36(1)(k) payment determined on

a per-injury basis). The award of $25,344.00 is thus reversed; the insurer's liability for § 36(1)(k) benefits is limited to $15,000.00.

The insurer next argues the award of costs incurred for the maintenance and registration of the employee's handicap-equipped van should not be included as a necessary expense, nor should the cost of the employee's meals, some $715.00, incurred during his stay at the Residence Inn, while his house was being rehabilitated to accommodate his tetraplegic condition. (Ins. br. 8.) The insurer argues that as the food costs would have been spent anyway had the employee been home, they should not have been included as a reasonable expense. Id.

The judge adopted the employee's credible testimony "that each and every expense reflected [in Exhibit 4] is actual and is authenticated and was incurred pursuant to Section 13 and 30, and is reasonable, necessary and related to Mr. Marino's industrial accident of January 26, 2010." (Dec. 6.) As for the costs associated with the van, the judge wrote: "I dismiss out of hand the unsupported theory floated by the Insurer that the direct costs incurred for the registration and maintenance of the necessary handicapped equipped van are the responsibility of the Employee." Id. In regard to the food purchases while at the hotel, the judge found "such expenses are in fact under the nature and circumstances of this claim and are indeed reasonable, necessary, related and appropriate for the Insurer to pay." Id.

In "dismissing out of hand" the insurer's argument regarding the maintenance and licensing costs of the van, the judge failed to take into account our decision in Stevens v. Northeastern University, 11 Mass. Workers' Comp. Rep. 167, 172 (1997). There we noted that, while the provision of a motorized, specially equipped, handicap van by the insurer was covered under § 30, fourth paragraph, "the insurer would not be responsible for the vehicle's general maintenance or other ownership expenses."[4] Consequently the case must be

[4] The employee argues that this language was *dicta* in the Stevens case, as the issue there was whether a motorized van could be ordered paid for by the insurer at all. (Employee's

remanded for findings on what expenses submitted by the employee were for the van's maintenance and ownership costs, including the costs of licensing. Once having determined those costs, the judge must order that they be deducted from any future claims for expense reimbursement submitted by the employee.

In regard to the cost of food incurred by the employee while he was out of his house, the judge made no findings of fact on the regular food expense versus the expenses outside the house, but merely concluded that the expenses were "indeed reasonable, related and appropriate." (Dec. 6.) It was error for the judge not to make such findings of fact, in light of Levenson's Case, 346 Mass. 508, 511 (1963). In Levenson, an employee was found entitled to the cost of his medically necessary relocation to Florida, to the extent that his living costs exceeded his normal costs of living. Recently, we held that an insurer was required to pay for the cost of handicapped housing, to the extent that it exceeded the employee's prior housing costs. DeOliveira v. Calumet Const. Corp., 29 Workers' Comp. Rep. ___ (October 27, 2015). Recommittal for findings is not required, however, as the judge found the employee's testimony for "each and every expense" in Exhibit four to be credible. (Dec. 6.) The employee testified as follows about the food expense:

> Question: Now, you testified with regard to your stay at the Residence Inn for approximately seven months. And your food was $715. Was that food that you- what food did you purchase when you were there?
>
> Employee: Basic staple foods, milk, juices, fruits; regular food. I don't know how to detail it.

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br. 5.) However, in recommitting that case for findings on causation, we also noted that the cost of the proposed van could be taken into account, to determine "what is economically necessary to transport the motorized wheelchair." Id. at 172. We then carved out from the determination of what would be necessary costs on the recommittal the "general maintenance or other ownership expenses." Id. We see no need to revisit this ruling.

> Question: And if you were living at home as opposed to the Residence Inn, you would have been purchasing those foods for yourself, is that correct?
>
> Employee: Correct.

(Tr. 46.)

There was thus insufficient support in the record for the judge's finding that the food expense was reimbursable under § 30, as no cost differential was shown. The judge's award of $715.00 in cost reimbursement was thus error and is vacated. The insurer may take a credit for this amount in any future expense reimbursement submitted by the employee for his living expenses.

The insurer next argues the mileage reimbursement ordered by the judge should not have been considered, because Exhibit 4, which contained the mileage listings, was in violation of 452 Code Mass. Regs. 1.07(2)(c)(2).[5] It argues that the required affidavit from the employee setting out the exact distance from his home to the place of treatment and back was not attached to the claim. The employee responds that the insurer did not object to his submission of the mileage

[5] 452 Code Mass. Regs. § 1.07 states, in relevant part;

> (2) Pursuant to the provisions of M.G.L. c. 152, § 7G, the following documentation must be attached to a claim for benefits, or complaint for modification or discontinuance of benefits before it will be processed by the Office of Claims Administration:
>
> (c)(2). Claims for mileage reimbursement necessarily incidental to the provision of adequate and reasonable medical services shall be accompanied, where applicable, by the following:
>
> (a). an itemized bill confirming the date and location of treatment;
>
> (b). an affidavit from the claimant or the claimant's attorney attesting to the exact mileage from the employee's home to the site of the treatment and back, and, except where the travel is incidental to an examination requested by the insurer or the department, the purpose of the treatment and reason for the trip;

exhibit and to his testimony about the attached receipts, thus it has waived its objection to any violation of the regulation.

The insurer correctly notes that it raised "Mileage reimbursement" as an issue in its hearing memorandum, stating there that "no breakdown of mileage reimbursement request as required pursuant to 452 CMR 1.07(2)(c)(2) [was attached]." (Ins. Hearing Memorandum, 1.) However, this was too late in the process to preserve its objection. The regulation is addressed to the filing stage of the proceedings, Kourouvacilis v. F. L. Roberts and Co., 12 Mass. Workers' Comp. Rep. 100, 102 (1998), and it is at that stage that any objection to noncompliance with the regulation must be made. We recently held that failure of a party to attach appropriate documents to a claim does not disqualify consideration of the claim at the hearing level.

> Nevertheless, the record is devoid of any reference to a formal contemporaneous objection raised by the insurer at the time the claim was sent forward by the conciliator. The remedies available to the insurer included a formal request to rescind the referral to the conciliation manager, the senior judge, or both. As the insurer did not avail itself of any of its available options, the issue is deemed waived.

Wunschel v. Charter Communications, 29 Mass. Workers' Comp. Rep. ____ (December 22, 2015). We see no objection at the conciliation level to the claim being forwarded to Dispute Resolution, nor any request to the Senior Judge to rescind the referral due to the lack of documentation. We therefore consider the insurer's objections at the hearing and on appeal to have been waived.

Finally, the insurer argues the award of an enhanced attorney's fee of $15,000.00 was "clearly excessive," as there was no support in the record for basing the award on seventy-five hours of time spent by the employee's attorney on the case. It requests that the matter be recommitted for further findings explaining the basis for the fee. The employee's counsel defends the award of the enhanced fee on grounds of the exercise of appropriate judicial discretion.

We have said that "[a]ny decision to award an enhanced fee should be grounded in the record evidence and based on specific factual findings about the complexity of the hearing dispute or the effort expended by the attorney at hearing." Sylvester v. Town of Brookline, 12 Mass. Worker's Comp Rep. 227, 231-232 (1998). The decision is committed to the discretion of the judge and we will not impose our own opinion on the appropriateness of the fee, DiFronzo v. J.F. White/Slattery/Perini Joint Venture, 15 Mass. Workers' Comp. Rep. 193, 197 (2001), as long as the findings required are made "consistent with his statutory authority." Jones v. North Central Correctional Center, 27 Mass. Workers' Comp. Rep. 111, 113 (2013), citing Mulkern v. Massachusetts Turnpike Authy., 20 Mass. Workers' Comp. Rep. 187, 200 (2006).

The judge here enhanced the fee "because the Employee Counsel was mandated to do significant (sic) more legal work and accounting mandated by the Insurer's multi faceted appeal involving these complex claims for benefits." (Dec. 9-10.) But the judge ran afoul of his statutory authority when he stated, "I conclude that Employee Counsel performed over 75 hours of necessary professional legal preparation, documentation and attendance to produce this favorable decision for his client." (Dec. 10.) As the insurer points out, there is nothing in the record to substantiate the claim that the employee's attorney spent seventy-five hours in preparation, or even anything close to that amount of time. The only document submitted to the judge was a short letter from the employee's counsel, which read as follows:

> The above captioned matter should be ready for writing of a hearing decision in the very near future. Due to the complexity of the dispute and the effort extended, we would respectfully request consideration for an enhanced attorneys' fee, pursuant to § 13A in the event that we prevail.

Employee's attorney's letter to Judge Preston (Rizzo, supra.) Five days later, the insurer filed an objection to an enhanced fee, noting that "[t]his case involved a hearing that was concluded on the morning of October 8, 2013, and one medical

deposition, as well as the submission of additional medical records." (Insurer's attorney's letter to Judge Preston.) The judge's finding that the employee's counsel spent seventy-five hours in preparing and trying the case thus lacked evidentiary support. As we cannot determine to what extent the erroneous attribution of that time played in the award of the enhanced fee, we must vacate it and recommit for further findings that are supported by the record. Keefe v. Mass. Bay Transportation Authority, 16 Mass. Workers' Comp. Rep. 455, 456 (2002).

Accordingly, we vacate the judge's award of § 36(1)(k) benefits and order in its stead the amount of $15,000.00, the insurer to avail itself of the remedies of G. L. c. 152, § 11D(3) and (4), if it so wishes, for recoupment of the overpayment. We also reverse and deny the employee's request for reimbursement of food costs of $715.00, the insurer to take credit for this amount in any future request by the employee for reimbursement of expenses. We recommit the matter for further findings, supported in the record, on any enhanced attorney's fee ordered.

As the employee prevailed, in part, in this insurer's appeal, the insurer is directed to pay the employee's counsel a fee of $1,618.19, pursuant to G. L. c. 152, § 13A(6).

So ordered.

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William C. Harpin
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

Filed: **April 5, 2016**