

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF INDUSTRIAL ACCIDENTS
BOARD NOs. 003567-16 and 020702-18**

Scott Sologaistoa	Employee
BSH Bridgewater State Hospital Commonwealth of Massachusetts	Employer Self-Insurer
OCCC Old Colony Correctional Center Commonwealth of Massachusetts	Employer Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabiszewski, Fabricant and Koziol)

The case was heard by Administrative Judge Bergheimer.

APPEARANCES

Paul S. Danahy, Esq., for the employee
Robin Borgstedt, Esq., for the self-insurer

FABISZEWSKI, J. The self-insurer appeals from the administrative judge's decision awarding the employee §34 temporary total incapacity benefits, plus §30 medical benefits. We affirm the decision in all respects but address below two of the self-insurer's arguments that warrant discussion.

We summarize the facts pertinent to the issues raised on appeal. At the time of hearing, the employee, age 48, had worked for the employer as a correction officer for 23 years. (Dec. 6.) He was responsible for the care, custody and control of adult male inmates with mental health issues. His job was physical and involved extensive walking and climbing stairs, as well as bending, squatting, reaching, stretching and moving furniture. He was also responsible for physically restraining inmates. On February 10, 2016, while working at Bridgewater State Hospital, he injured his right knee while struggling with a

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combative inmate. (Dec. 6; Tr. 21.) In July 2016, he underwent surgery for a right knee meniscus tear. He missed 8 months of work but returned to full duty after his surgery.

On August 7, 2018, while working at Old Colony Correctional Center, the employee was running to respond to an emergency when he felt a pop in his right knee. (Dec. 7; Tr. 25.) He sought medical treatment and remained out of work for approximately a month before returning to work in a full duty capacity. After his return to work, he experienced increased pain and had difficulty climbing stairs and performing his rounds of the facility. Ultimately, in November 2023, his treating physician took him out of work and referred him to another surgeon, who subsequently recommended a total knee replacement.

In November 2023, the employee filed claims under both dates of injury, seeking temporary total incapacity benefits pursuant to §34 from November 2, 2023, to date and continuing, as well as medical benefits pursuant to §§13 and 30, and attorney's fees pursuant to §13A. *Rizzo v. M.B.T.A.*, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file.) On April 5, 2024, the administrative judge issued a §10A conference order awarding the employee §34 temporary total incapacity benefits from November 2, 2023, to date and continuing, plus medical benefits pursuant to §§13 and 30, to include treatment for the right knee, based on the injury of August 7, 2018. (Dec. 3.) The administrative judge denied the claim for benefits based on the February 10, 2016, date of injury. Both the employee and the self-insurer filed timely appeals. Pursuant to §11A(2), the employee was examined by Richard Smith, M.D., on July 10, 2024. Based on the complexity of the medical issues involved, the administrative judge allowed the submission of additional medical evidence. (Dec. 5.)

A hearing *de novo* was held on October 24, 2024. (Dec. 3.) On March 17, 2025, the administrative judge issued an amended decision ordering the self-insurer to pay §34 temporary total incapacity benefits for the February 10, 2016,

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injury at the rate of \$1,278.25 per week, based on an average weekly wage of \$2,130.41, from November 2, 2023, to date and continuing, plus medical expenses pursuant to §§13 and 30, and attorney fees and expenses. (Dec. 17.) The administrative judge also ordered the self-insurer to take credit for any benefits previously paid and denied the employee's claim regarding the alleged injury of August 7, 2018. The self-insurer filed a timely appeal. *Rizzo, supra*.

We address the self-insurer's two arguments relating to the sufficiency of the documentation attached to the employee's claims for benefits. Specifically, the self-insurer asserts that the administrative judge erred by awarding benefits to the employee and a fee to his attorney because the employee's claim for benefits, when filed, failed to satisfy the requirements of 452 Code Mass. Regs. §1.07(2)(f) and G.L. c. 152, §10(1), respectively. (Self-Ins. br. 25, 26.) The self-insurer argues that the reviewing board must dismiss the employee's claims and declare all orders and decisions voided *ab initio* because the employee failed to file his claim with documentation satisfying those statutory and regulatory requirements. (Self-Ins. Reply br. 5.) We disagree.

Pursuant to G.L. c. 152, §5, the Director of the Department of Industrial Accidents is charged with "promulgat[ing] rules and regulations consistent with [Chapter 152] for carrying out the functions of the department." G.L. c. 152, §5. General Laws, c. 152, §7G, specifically requires, "the promulgation of rules setting forth the required documentation to be attached to any claim for benefits," further stating that "the attachment of all required documentation shall be a prerequisite for the acceptance of said claim or complaint for processing by the office of claims administration." The Department's adjudicatory rules are codified in 452 Code of Mass. Regs. §1.00, et. seq., with the filing requirements for claims contained in § 1.07(2). With respect to claims for weekly incapacity benefits, 452 Code Mass. Regs. §1.07(2) states, in relevant part:

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

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modification or discontinuance of benefits before it will be processed by the Office of Claims Administration:

. . .

(f) Claims for benefits under M.G.L. c. 152, §§34, 34A and 35 shall be accompanied by a copy of a physician's report or record not more than six months old that describes the extent and duration of the employee's physical or emotional incapacity for work and which relates said incapacity to the claimed industrial injury.

In November 2023, when filing his claims for weekly benefits under both dates of injury, the employee attached the same one-page medical document to each of those claims. *Rizzo, supra*; (Self-Ins. br. 24; Employee br. 16; Ex. 5.) The document, dated November 2, 2023, was a form signed by the employee's treating physician, Andrew Rogers, M.D., which listed the employee's name and date of birth, with a check mark placed next to the typed phrase "[u]nable to work at this time." (Ex. 5.) The claims were accepted by the Department's Office of Claims Administration and a conciliation was scheduled. *Rizzo, supra*.

In *Marino v. Progression Systems*, 30 Mass. Workers' Comp. Rep. 93 (2016), the Reviewing Board addressed an insurer's objection, raised at hearing, to the sufficiency of the documentation attached to a claim for mileage reimbursement under 452 Code Mass. Regs. §1.07(2)(c)(2), noting:

[t]he 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...[the] failure of a party to attach appropriate documents to a claim does not disqualify consideration of the claim at the hearing level.

Marino, at 100. Thus, while the documentation attached to the employee's claim may not have complied with the regulation, the self-insurer's objections raised at the conference, the pre-hearing conference, the hearing, and in its closing

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argument were made far too late in the process.¹ The time to object to noncompliance with the regulation was at the filing stage. We agree with the employee that if the self-insurer was aggrieved by the acceptance and processing of the claim, it should have filed an objection with the senior judge. (Employee br. 17.) The self-insurer incorrectly argues that this would impose a new remedy or obligation into the provisions of the regulations. (Self-Ins. Reply br. 4.) The procedure for objecting to noncompliance with a filing regulation has been well established by the Reviewing Board through the case law.

[T]he equitable powers of the board are deeply rooted. ‘The board is not bound by strict legal precedent or legal technicalities, but, rather governed by the practice in equity...The term ‘in equity’ is consonant with the liberal construction to be given to c. 152 and has been ‘applied to supply a remedy [even] when there [may be] a gap in the statute.’

Bolduc’s Case, 84, Mass. App. Ct. 583, 588-589 (2013), quoting *Utica Mutual Ins. Co. v. Liberty Mutual Ins. Co.*, 19 Mass. App. Ct. 262, 267 (1985).

Specifically, when the claim was sent forward by the conciliator, the self-insurer could have filed a formal request to rescind the referral with the conciliation manager, the senior judge, or both. *Wunschel v. Charter Communications*, 29 Mass. Workers’ Comp. Rep. 227, 228 (2015)(Insurer’s objection to noncompliance with filing regulation deemed waived where the insurer failed to

¹ In its brief, the self-insurer argues that the employee and the Department’s failures to comply with the regulation require dismissal of the employee’s claims with a declaration that the orders and decisions filed thereunder were void *ab initio*. (Self-Ins. br. 27). This alleged remedy ignores the purpose of the regulation and would produce an absurd result. While the documentation regulations are addressed to the filing stage of the proceeding, *Kourouvacilis v. F.L. Roberts and Co.*, 12 Mass. Workers’ Comp. Rep. 100, 102 (1998), once at the conciliation level, the remedy to address insufficient documentation lies with the conciliator under 452 Code Mass. Regs. § 1.08(5), which directs the conciliator to withdraw the claim “without prejudice,” so that the employee may refile the claim once sufficient documentation is obtained. 452 Code Mass. Regs. § 1.08(5). Notably, that course of action may be “waived by the opposing party at or before the conciliation.” *Id.* Once a claim reaches a conference or hearing, “[t]he stage of proceedings governed by the regulation [is] long completed. It would violate justice and equity to apply the regulation to dismiss [the claim].” *Kourouvacilis*, at 102.

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raise any contemporaneous objection to the conciliation manager, the senior judge or both, at the time that the claim was forwarded to Dispute Resolution.); *Marino v. Progression Systems*, 30 Mass. Workers' Comp. Rep. 93 (2016)(objection to compliance with filing regulation must be made at the conciliation level or to the senior judge at the time the claim is forwarded to Dispute Resolution.) Thus, we find the self-insurer's failure to timely avail itself of the existing remedies is deemed a waiver of the issue.

The self-insurer also argues that the administrative judge erred at both the conference and hearing levels in awarding the employee's attorney a fee in contravention of G.L. c. 152, §10(1), because the medical documentation attached to the employee's claim was not sufficient to be deemed "relevant" to the claims filed in the employee's cases. (Self-Ins. br. 25.) General Laws c. 152, §10(1) states, in relevant part:

In order for an attorney's fee to be required under section thirteen A, pursuant to a dispute over benefits under this chapter, such claim shall have been sent to the insurer by certified mail....No attorney's fee shall be due for services involving a claim sent to the insurer which does not include a copy of a medical report **relevant to the alleged claim** in the possession of the employee or his attorney.

G.L. c. 152, §10(1) (emphasis added.)

We disagree with the self-insurer that the administrative judge erred in awarding attorney's fees in this matter. First, insofar as it claims the judge erred in ordering a §13A(5) hearing fee, the self-insurer fails to appreciate that pursuant to §13A(10), the prohibition on ordering attorney's fees included in §10(1) does not apply to the hearing stage.² See, *Davidson v. S.C. Management Corp*, 32 Mass. Workers' Comp. Rep. 41, 51 (2018)(§10(1) prohibition on attorney's fees applies only to the conciliation and conference stage.) The self-

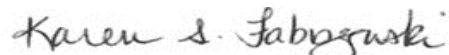
² G.L. c. 152, §13A(10) states, in relevant part, that "...[n]o fees shall be payable under subsection (1), (2), (3) or (4) unless the claim subject to the dispute was filed according to provisions of section ten."

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insurer's argument against the awarding of a fee at conference also fails since the provisions of §10(1) merely require submission of a "medical report relevant to the alleged claim." G.L. c. 152, §10(1). Here, the administrative judge specifically rejected the self-insurer's argument on the issue, stating that the employee's claims were accompanied by the medical note signed by the employee's treating physician, Dr. Rogers. (Dec. 16.) The administrative judge awarded the employee benefits at conference, clearly demonstrating that she found Dr. Rogers's note relevant to the claim, as was in her considerable discretion to do so. We find no error in her determination of the relevancy of the note. With relevancy established, the self-insurer's argument that no conference fee is due pursuant to §10(1) is meritless.

Accordingly, we affirm the judge's decision. The insurer is ordered to pay employee's counsel an attorney's fee pursuant to §13A(6), in the amount of \$1,964.82, plus necessary expenses

So ordered.



Karen S. Fabiszewski
Administrative Law Judge



Bernard W. Fabricant
Administrative Law Judge



Catherine Watson Koziol
Administrative Law Judge

Filed: **June 8, 2026**