

# COMMONWEALTH OF MASSACHUSETTS

## DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 077799-91

Stanley Kowalczyk  
Morgan Construction Co.  
Liberty Mutual Insurance Co.

Employee  
Employer  
Insurer

### REVIEWING BOARD DECISION (Judges McCarthy, Wilson and Smith)

APPEARANCES  
Charles W. Dixon, Esq., for the employee  
Patricia A. Costigan, Esq., for the insurer

**MCCARTHY, J.** Stanley Kowalczyk filed a claim for payment under § 36 of the Act for loss of function of the low back. The insurer resisted the claim denying, among other things, that the employee suffered a back injury arising out of and in the course of his employment. After a conference on the claim held under § 10A of the Act, the assigned administrative judge denied the claim. The employee filed a timely appeal. Because this was a case involving a dispute over a medical issue, the appealing party was obliged to pay a fee to defray the cost of the impartial medical examination required by § 11A:

When any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order pursuant to § 10A . . . [t]he insurer or any claimant represented by counsel who files such an 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 [impartial] medical examination under this section within ten days of filing said appeal. . . .”<sup>[1]</sup>

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<sup>1</sup> Rather than the state average weekly wage on the date the appeal is filed, the appeal fee established by the department is now set at \$350.00. The employee did not pay the required fee and his petition to enlarge the time to submit the fee was denied. As the fee was not paid, no § 11A impartial medical examination was scheduled.

Notwithstanding the failure to perfect the appeal, the case was assigned back to the same administrative judge for a hearing under § 11. The administrative judge rejected the insurer's argument that he lacked jurisdiction to hold a hearing and, on July 7, 1998, filed a hearing decision in which he found that the employee had not submitted the requisite \$350.00 appeal fee and thus had not perfected his appeal. The judge went on to order that the claim be dismissed without prejudice and pointed out that Kowalczyk could refile the claim if he so desired. We have the case on the insurer's appeal from that decision.

The insurer argues that the judge exceeded his authority by holding a hearing and filing a decision when the claim was not properly before him. We agree. As the fee required by § 11A (\$350.00) was not paid, the appeal from the adverse conference order was not perfected.<sup>2</sup> The fee unpaid, no impartial medical examination can take place and thus no medical report can be provided to the judge and the parties. In the absence of such a report, a hearing cannot be scheduled. O'Brien v. Blue Cross/Blue Shield, 9 Mass. Workers' Comp. Rep. 16 (1995); Rossetti v. Eastern Seaboard Concrete Constr., 10 Mass. Workers' Comp. Rep. 413 (1996); Mitchell v. Pollyflow, Inc. 11 Mass. Worker's Comp Rep. 275 (1997). General Laws c. 152, § 11A(2) provides in pertinent part as follows:

The impartial medical examiner, so agreed upon or appointed, shall examine the employee and make a report at least one week prior to the beginning of the hearing, which shall be sent to each party. No hearing shall be commenced sooner than one week after such report has been received by the parties.

The administrative judge lacked jurisdiction to convene a hearing and to file a decision under § 11. We reverse that decision because it exceeds the scope of his authority.

So ordered.

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<sup>2</sup> While the analogy is not perfect, this is comparable to a failure to pay the required filing fee when filing a civil complaint in the district or superior courts of the commonwealth. Such a case would never appear on a judge's docket for trial.

**Stanley Kowalczyk**  
**Board No. 77799-91**

Filed: September 17, 1999

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William A. McCarthy  
Administrative Law Judge

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Sara Holmes Wilson  
Administrative Law Judge

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Suzanne E.K. Smith  
Administrative Law Judge