COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board No.:** 024362-05

Steven Mike	**Employee**
Zebra Striping & Sealcoat	**Employer**
Travelers Insurance Company	**Insurer**

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Koziol)

The case was heard by Administrative Judge Sullivan.

APPEARANCES

James R. Hodder, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Charles E. Berg, Esq., for the employee on brief
Nicole M. Edmonds, Esq., for the insurer at hearing
Donna Gully-Brown, Esq., for the insurer on brief

COSTIGAN, J. Finding that the employee failed in his burden of proof, the administrative judge denied his claim for § 13A costs related to the insurer's voluntary payment of the employee's claim for § 36 loss of function and disfigurement benefits. The judge also found the law firm of Ellis & Associates brought and prosecuted the claim without reasonable grounds, and sua sponte, pursuant to § 14(1),[1] ordered the firm to pay to the insurer the cost of the

[1] General Laws c. 152, § 14(1), provides, in pertinent 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.

proceedings. We have the employee's appeal. We agree the award of § 14(1) penalties against the employee's attorneys was error, but otherwise affirm the judge's decision.

The relevant facts and procedural history are reflected in the joint stipulations of the parties at hearing:

> 1. On October 11, 2006, the employee, through Ellis & associates, filed a claim
> for Section 36 benefits ($916.85 loss of function and scarring). The filing included a letter from Ellis & Associates noting an attorney's lien for fees, attached as Exhibit 1.
>
> 2. Because of a claim already pending, the claim was returned by the DIA.
>
> 3. On October 27, 2006, the insurer paid the $916.85 in requested Section 36 benefits to the Employee within the 21-day timeframe set forth in Section 13A. The employee received, endorsed, and cashed the check. A copy of the check is attached as Exhibit 2.
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> 4. Ellis & Associates re-filed the Section 36 claim on May 11, 2007.
>
> 5. The insurer denied the claim, stating that the claim had already been paid.
>
> 6. A Conference was held before Judge David G. Sullivan on August 28, 2007. On August 28, 2007, Judge Sullivan denied Employee's claim. The Employee timely appealed and the matter is now pending for a Hearing de novo.

(Ex. 8.) The judge adopted these stipulations as findings of fact. (Dec. 3.) The judge noted that at the hearing, the insurer did not reassert its claim, advanced at the § 10A conference, for § 14 penalties, and the employee did not pursue the second filed claim for § 36 benefits. Instead, he asserted only a claim for costs pursuant to § 13A. The judge wrote:

> Employee's counsel used the vehicle of a second Section 36 claim in order to prosecute a claim for reimbursement of costs that it alleged to have incurred

> on its initial Section 36 claim. *Employee's counsel sought a legal determination* on a potential new source of income. Did an employee have the right to recover various costs for the preparation of a claim for Section 36 paid on a timely basis by the insurer? Were such costs set-out specifically in the "Act" or, if not, was it the intention of the legislature to require insurers to assume such costs?

(Dec. 7; emphasis added.) The judge, however, declined to answer the legal question involved in the employee's claim:

> While employee's counsel made general allegations of costs associated with the Section 36 claim, he never offered any actual proof of such alleged costs. Absent proof, I need not reach any more elaborate theories. I find that the employee failed to make a prima facie claim for payment of such expenses, thus the question is moot.

(Dec. 7-8; emphasis in original.)

The employee argues the judge acted arbitrarily, capriciously and in contravention of the law when he failed to address "the merits of the issue of whether the employee is entitled to reimbursement of his costs when an insurer pays a claim for Section 36 loss of function within 21 days of its receipt of the claim," and "instead dismissed the employee's claim for costs for failure to prove the reasonableness and necessity of such costs, *an issue that was not before him*." (Employee br. 10; emphasis added.) In our view, there was *no* issue or claim properly before the judge, and the hearing never should have taken place.

We note that neither the employee's original § 36 claim dated October 11, 2006, (Ex. 3), nor the second § 36 claim dated May 1, 2007, (Ex. 12), sought reimbursement of costs. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file). [2] The record does not reflect that the employee, prior to withdrawing the § 36

[2] In a letter to the insurer dated October 11, 2006, employee's counsel wrote:

"Kindly note our attorney's lien for fees in accordance with Chapter 221 Section

50." (Ex. 3.) That statute has been held applicable to workers' compensation claims:

The first sentence of c. 221, § 50, gives an attorney the specific right to assert a lien for his fees. . . . But the second sentence is clear that where the method for determining fees is expressly provided by statute, the previous provision giving jurisdiction to the courts is inapplicable: "[I]f the proceeding is not pending in a court, he superior court may determine and enforce the lien; provided, that the provisions of this sentence shall not apply to any case where the method of determination of attorneys' fees is otherwise expressly provided by statute." Maxwell v. North Berkshire Mental Health, 16 Mass. Workers' Comp. Rep. 108, 111(2003), quoting G. L. c. 221, § 50. It is beyond dispute that G. L. c. 152, § 13A, expressly provides a method of determination of attorneys' fees. Moreover, 452 Code Mass. Regs.

§ 1.19, provides, in pertinent part:

> . . . . When the employee's attorney and the insurer are unable to agree [on a fee and expenses], the administrative judge or Reviewing Board to whom the case was assigned shall determine the appropriate fee pursuant to M. G. L. c. 152, § 13A.
>
> An employee and his attorney may agree on a retainer, but only to pay for necessary and reasonable expenses and disbursements related to his representation. Any employee's attorney *entitled to a fee paid by the insurer* under M. G. L. c. 152, § 13A, shall provide the administrative judge or Reviewing Board with an itemization of any necessary and reasonable expenditures and disbursements related to his services, including expenses and disbursements paid by the employee. The insurer shall reimburse the employee for any such expenses or disbursements approved by the administrative judge or the Reviewing Board.

(Emphasis added.) "[A]s 'necessary expenses' are awarded only in conjunction with attorney's fees, no expenses are due because no fee is due. [Footnote omitted.] See § 13A(1-6)." Packard v. Swix Sport USA, Inc., 22 Mass. Workers' Comp. Rep. 305, 310 (2008), aff'd Packard's Case, 76 Mass. App. Ct. 1115 010)(Memorandum

claim, moved to join a claim for costs. Therefore, once the employee withdrew his second claim for § 36 benefits at the July 18, 2008 hearing -- for the simple reason the insurer had paid the full § 36 benefit claimed over twenty months earlier -- there was no residual claim on which to proceed at the hearing. Thus, we are puzzled by the judge's statement on the record:

> The claims and defenses are as follows [sic]: The Employee seeks Section 13(A) [sic] costs. The insurer denies same; in fact, this is the case where there will be no testimony. Is it is [sic] a legal determination based on documents.

(Tr. 3.) We can only conclude that the "claim" for costs, although never filed or joined, was tried by consent. See Freeman v. University of Mass. Boston, 18 Mass. Workers' Comp. Rep. 138, 140 (2004), citing Lazarou v. City of Peabody, 13 Mass. Workers' Comp. Rep. 386, 390-391 (1999); Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 402 n.5 (1998); and Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243, 244-245 (1997). Because both the judge and the insurer acceded to the hearing going forward, we deem the judge's sua sponte award of § 14 costs against the employee arbitrary, and vacate the award.

The employee argues that "[a] decision on *an issue* not tried by the parties is arbitrary, capricious and contrary to law," but cites to Boyden v. Epoch Senior

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and Order Pursuant to Rule 1:28). Thus, because there was no attorney's fee payable by the insurer, a fact conceded by the employee, there was no entitlement to reimbursement of expenses. Moreover, 452 Code Mass. Regs. § 1.02, defines "Necessary Expenses," as used in § 13A, as "all reasonable out-of-pocket costs, as the Department may set, to a claimant's attorney incurred by said attorney in *prosecuting a claim for benefits* or contesting a complaint filed by the insurer. . . ." (Emphasis added.) When an insurer pays a claim within twenty-one days of its receipt of the claim, regardless of whether the claim filing is accepted by the department, no prosecution of the claim ensues, no attorney's fee is due, and no out-of-pocket expenses are recoverable.

Living, Inc., 23 Mass. Workers' Comp. Rep. 61, 63 (2009), for the proposition that "[a] judge is restricted to deciding the *claim(s)* presented for adjudication, and nothing more." (Employee br. 12-13; emphases added.) The employee misperceives the nature of the dispute the judge and the parties agreed he would decide. The genesis of every case litigated at the department is the filing, by an employee or a third party, of a claim for benefits, or the filing by an insurer of a complaint for discontinuance of benefits. Neither the administrative judges who serve on the industrial accident board nor the administrative law judges who serve on the industrial accident reviewing board are authorized by statute to address and decide "issues," that is, abstract questions of law, in the absence of a claim or complaint. Stated differently, we have no authority to render declaratory judgments, or advisory opinions on an issue of law, independent of an existing claim or complaint.

Notwithstanding that the employee's "claim" for § 13A costs was tried by consent, it carried with it the same burden of proof applicable to every other claim under c. 152: the burden to prove every element of the claim. Sponatski's Case, 220 Mass. 526 (1918). Here, an essential element of the claim was the amount of the costs sought. The employee does not argue the judge erred in finding he introduced no evidence of the costs claimed. Accordingly, we affirm the judge's finding in that regard. For the reasons discussed, we vacate the judge's award of § 14(1) penalties against Ellis and Associates, but otherwise affirm his decision denying and dismissing the employee's claim for § 13A costs.

So ordered

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **December 9, 2010**