COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037322-10**

Cornelia DeLeon	Employee
Department of Correction - MASAC	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Fabricant)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
William J. Branca, Esq., for the employee at hearing
Vincent F. Massey, Esq., for the self-insurer at hearing
Robin G. Borgestedt, Esq., for the self-insurer on appeal

HORAN, J. The self-insurer appeals from a decision ordering it to pay the employee $1,000 in § 36 benefits, a $10,000 penalty pursuant to § 8(1), and an attorney's fee pursuant to § 13A. We affirm the decision.

On August 25, 2010, the employee suffered a compensable injury to her right knee. In March, 2013, she filed a claim seeking $19,269.23 in loss of function and disfigurement benefits under § 36. On June 26, 2013, the parties appeared at conference on that claim, and executed a Form 113 "Agreement to Pay Compensation" (Agreement), which the judge approved. Accordingly, no conference order issued. The Agreement obligated the self-insurer to pay the employee $14,000 in § 36(k) benefits, and a $1,000 attorney's fee under § 13A.[1] The Agreement contained no other material provisions.

On July 5, 2013, the self-insurer, relying on the payment reduction provision in

[1] It also obligated the self-insurer to reimburse employee's counsel $250 in costs. (Form 113, approved June 27, 2013; Dec. 2.)

§ 13A(10),[2] and the definition of "cash award" found in 452 Code Mass. Regs. § 1.02,[3] paid the employee's counsel $1,000, and paid the employee $13,000, reducing the amount due her under the Agreement by the amount of the attorney's fee. (Dec. 4, 6.) On August 26, 2013, the employee filed a claim seeking a § 8(1)[4] penalty for the self-insurer's failure to pay her the full amount under the Agreement, and for the $1,000 they had offset. (Dec. 5.) The judge denied the claim at conference, and the employee appealed. Id.

There were no witnesses at the April 30, 2014 hearing; the case was tried on an agreed statement of facts, accompanied by exhibits. (Dec. 3-5.) The employee sought

[2] General Laws c. 152, § 13A(10), provides, in pertinent part:

> In any instance in which an attorney's fee under subsection (1) to (6), inclusive, is due as a result of a cash award being made to the employee either voluntarily, or pursuant to an order or decision, the insurer may reduce the amount payable to the employee within the first month from the date of the voluntary payment order or decision, by the amount owed the claimant's attorney; provided, however, that the amount paid to the employee shall not be reduced to a sum less than seventy-eight percent of what the employee would have received within that month if no attorney's fee were payable.

[3] 452 Code Mass. Regs. § 1.02, provides:

> Cash Award as used in M.G.L. c. 152, §13A(10), shall mean any specific compensation benefits payable under M.G.L. c. 152, §36 or §36A and any weekly benefits payable under M.G.L. c. 152 of an amount that exceeds the weekly amount being paid the employee for the week immediately prior to the date of the voluntary payment, order or decision.

[4] General Laws c. 152, § 8(1), provides, in pertinent part:

> Any failure of an insurer to make all payments due an employee under the terms of an . . . approved lump sum or other agreement, . . . within fourteen days of the insurer's receipt of such document, shall result in a penalty of two hundred dollars, payable to the employee to whom such payments were required to be paid by the said document; provided, however, that such penalty shall be one thousand dollars if all such payments have not been made within forty-five days, two thousand five hundred dollars if not made within sixty days, and ten thousand dollars if not made within ninety days.

$1,000 in unpaid § 36 benefits, and a penalty of $10,000 under § 8(1).[5] In defense of the claim, "[t]he self-insurer asserted that its actions were consistent with the controlling legal authority in effect on June 26, 2013, the approval date of the Form 113 Agreement." (Dec. 7.) On slightly different grounds than we rely upon, the judge found the self-insurer failed to pay the employee the full amount under the Agreement, and ordered it to pay the employee $1,000 in unpaid § 36 benefits, a $10,000 penalty pursuant to § 8(1), and an attorney's fee of $5,586.84. (Dec. 6-10, 12.)

The self-insurer's appeal fails because when the Agreement was reached in 2013, "the controlling legal authority in effect" was the Appeals Court's decision in Spaniol's Case, 81 Mass. App. Ct. 437 (2012), aff'd on other grounds, Spaniol's Case, 446 Mass. 102 (2013).[6] We therefore turn our attention to the Appeals Court's Spaniol decision to explain why the self-insurer's $1,000 reduction in payment to the employee ran afoul of the court's holding.

The material facts in Spaniol are perfectly analogous to the facts in this case. In Spaniol, the employee claimed § 36 benefits, and an agreement was reached to pay those benefits, along with attorney's fees and costs. Importantly,

> [b]oth the amount of the § 36 compensation to be paid to the employee under the settlement agreement as well as the amount to be paid to the attorney . . . were negotiated figures; in other words, they were less than what the employee originally sought or could potentially recover under the statute.

Spaniol, 81 Mass. App. Ct. at 438. The same holds true here. Also, as here, in Spaniol, "[t]he settlement agreement makes no reference to the payment-reduction provision of

[5] The employee also claimed the self-insurer violated § 14(1)(b). The judge denied that claim. On appeal, the employee raises no issue respecting that denial.

[6] The Appeals Court decision in Spaniol was filed on March 16, 2012; the Supreme Judicial Court's was filed on July 30, 2013. The SJC held the "definitions of 'cash award' and 'amount payable to the employee within the first month from the date of the voluntary payment, order or decision,' as promulgated by the commissioner, are not in harmony with the legislative mandate. Consequently, these definitions must be deemed void insofar as they encompass compensation for specific injuries pursuant to § 36." Spaniol's Case, 446 Mass. 102, 111 (2013).

G. L. c. 152, § 13A(10), nor does the agreement state or imply that the amounts due would be subject to that provision." Id. at 438-439. Based on those facts, the Appeals Court concluded that because the insurer had not "accepted" what the employee had claimed (it paid a reduced amount instead), it had not satisfied that element of § 13A(5).[7] Id. at 442. Accordingly, because it had not paid an attorney's fee pursuant to § 13A(5), the Appeals Court held that the payment reduction provision of § 13A(10) did not apply, because it requires an attorney's fee to have been paid *pursuant to* § 13A(1-6).[8] See footnote 2, supra.

Although the SJC would later reject the Appeals Court's rationale, and adopt a broader view preventing the application of the payment reduction provision to § 36 claims in general, the self-insurer was not entitled to ignore the Appeals Court's decision in Spaniol without consequence. In other words, at the time the self-insurer employed § 13A(10)'s payment reduction provision, the law was clear that, on these facts, it could not do so. Furthermore, when the employee filed her claim for an § 8(1) penalty (on August 26, 2013), the SJC had *already held* that the payment reduction provision, and the accompanying regulation, did not apply to § 36 claims. The employee has never conceded the self-insurer had the right to reduce its payment to her under the Agreement. Ergo, had the self-insurer paid the employee the $1,000 it had withheld originally, it could have escaped further financial harm by paying only another $1,000 in penalties

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[7] General Laws c. 152, § 13A(5), provides an attorney's fee is due:

> Whenever an insurer files a complaint or contests a claim for benefits and then either (i) *accepts the employee's claim* or withdraws its own complaint within five days of the date set for a hearing pursuant to section eleven; or (ii) the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney in an amount equal to three thousand five hundred dollars plus necessary expenses. An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.

(Emphasis added.) Nor had the insurer, in the court's estimation, satisfied the remaining elements of the statute. See Spaniol, 81 Mass. App. Ct. at 441-442.

[8] While Spaniol involved a § 13A(5) fee, the fee here was payable under § 13A(3). The difference is immaterial.

(because, at that time, such payment could have been made within 45 days of its obligation to pay). See footnote 4, supra.

The decision is affirmed.[9] Pursuant to G. L. c. 152, § 13A(6), the self-insurer shall pay the employee's attorney a fee in the amount of $1,618.19.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **September 22, 2016**

[9] We also reject the self-insurer's argument that the judge erred by ordering it to pay the employee an additional $1,000 in unclaimed § 36 benefits. He did not do so. His decision only obligated the self-insurer to pay the employee the $1,000 it improperly withheld under the terms of the Agreement.