COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004758-06**

Paulette Toto	Claimant
Florence Labbe (deceased)	Employee
Town of Barnstable	Employer
Massachusetts Educ. & Govt. Ass'n.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and McCarthy)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
Rickie T. Weiner, Esq., for the claimant at hearing
Charles E. Berg, Esq., for the claimant on appeal
Gregory M. Iudice, Esq., for the self-insurer at hearing
Holly B. Anderson, Esq., and Daniel M. Cunningham, Esq.,
for the self-insurer on appeal

HORAN, J. The claimant, the executrix[1] of the employee's estate, appeals from a decision in which the judge refused, on procedural grounds, to address her § 39 claim.[2] For the reasons that follow, we recommit the case for a determination of the amount due under § 39.[3]

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[1] The decision refers to her as an executor; we regard this simply as a scrivener's error.

[2] General Laws c. 152, § 39, provides, in pertinent part:

> When the appointment of a legal representative of a deceased employee . . . is required to comply with this chapter, the insurer shall furnish or pay for legal services rendered in connection with the appointment of such legal representative . . . and shall pay the necessary disbursements for such appointment, the necessary expenses of such legal representative . . . and reasonable compensation to him for time necessarily spent in complying therewith. Said payment shall be in addition to sums paid for compensation.

[3] We otherwise summarily affirm the decision.

We set forth the pertinent facts. Following a conference on the employee's claim for benefits, the judge ordered the self-insurer to pay a closed period of partial incapacity benefits. The employee appealed. She attended a § 11A medical examination, but died prior to the December 18, 2007 hearing which, owing to her death, was converted to a status conference. At that time, the judge denied employee's counsel's motion to join a § 39 claim. The hearing was rescheduled to April 25, 2008. The employee's daughter, Paulette Toto, was appointed executrix of her mother's estate on December 24, 2007. Ms. Toto then retained attorney Weiner to represent the estate, and claimed § 39 benefits at the April 25, 2006 hearing. Although the judge found "Paulette Toto appeared at Hearing with full authority to act on behalf of the Estate of Florence Labbe," and listed § 39 in his decision as an issue *sub judice*, he concluded the § 39 claim "was not viable" because counsel failed to renew his motion to join that claim at hearing.[4] (Dec. 1-3, 11.)

Despite the judge's refusal to address the merits of the § 39 claim in his decision, the parties agree the issue was raised and litigated at the hearing. (See Tr. 22-31; Employee br. 5, 11-13; Self-Ins. br. 11.) We agree, and conclude the legal issue we address is ripe for adjudication.

Because her appointment as executrix was acknowledged by the judge at the hearing, and because the self-insurer no longer objected to the § 39 claim being advanced at that time, the claimant propones the judge erred by failing to address the issue. The claimant, citing Lopes's Case, 74 Mass. App. Ct. 227 (2009), argues § 39 benefits are due because the appeal of the conference order could not proceed to hearing without the appointment of a representative to act on behalf of her mother's estate. While the decision in Lopes makes it clear the claim

[4] On page three of the decision, § 39 is listed as a claim; the self-insurer's denial of that claim is also noted. The self-insurer did not, however, contest the claimant's right to advance the claim at hearing. (See Tr. 22-31; Self-ins. br. 11.)

at bar could not proceed without such an appointment, it fails to address the issue raised by the self-insurer in defense of the claimant's appeal.

The self-insurer posits it is responsible to pay for the expenses associated with the appointment of the claimant *only* if there is no other independent reason for such an appointment. Noting the employee's ownership of an automobile at the time of her death, and unaware of any other means by which the claimant could legally transfer its title without the formal appointment of a representative, the self-insurer argues "it is not a foregone conclusion that the Claimant's appointment was 'necessary to comply with [c. 152],' and [that] the case should be recommitted" for further findings on this issue. (Self-ins. br. 13.) The self-insurer relies on Liberman's Case, 17 Mass. App. Ct. 598 (1984), in support of its position. To read Liberman that broadly ignores both its context, and the statute's legislative evolution.

In Liberman, the claimant/guardian was previously appointed by the Probate Court, and the insurer was paying benefits under §§ 31 and 32 of the act. Id. at 598-599. The Liberman decision does contain language suggesting that § 39 requires payment for expenses attendant to a legal representative "when the only justification therefore is the insurer's payment of [workers' compensation] benefits," id. at 600, but the decision did not reach the issue before us. The claim advanced in Liberman was for "the value of [the guardian's] services in driving [the decedent's minor son] to and from a public school, a religious school, various social and sporting activities, doctors' offices, a dentist, and various stores," along with "a claim for the use of his automobile in connection with the foregoing." Id. at 599. The court held the claimed expenses, having nothing to do with "collecting, managing disbursing and accounting for payments which [were] made by the insurer under § 31," were not within the coverage of § 39. Liberman does not hold that § 39 applies only where the *sole* asset of the estate is the decedent's workers' compensation claim. In fact, as noted in Lopes's Case, 74 Mass. App. Ct. 227 (2009), an earlier version of § 39 "imposed the obligation to furnish or pay

for legal services only where the appointment of a legal representative was '*not otherwise necessary.*' " Id. at 231 n.8, citing Mellon's Case, 231 Mass. 399, 401 (1918)(emphasis added). The phrase, "not otherwise necessary," was *removed* from § 39 by St. 1937, c. 317.[5] Neither party addresses this undeniable fact.

Accordingly, were we to adopt the self-insurer's argument, we would err by ignoring the statute's history. Rather, we conclude it was the obvious intent of the General Court, when it amended § 39 in 1937, to no longer condition an insurer's or self-insurer's liability for § 39 payments on whether the appointment of a legal representative was "not otherwise required." In other words, the fact the employee died owning an automobile, or other probate property, is irrelevant to the self-insurer's § 39 liability.

Because the claimant's appointment was required to properly pursue the claims advanced on behalf of her mother's estate, see Lopes, supra, we recommit the case for a determination of the amount due under § 39.[6]

So ordered.

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed:

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Dept. of Industrial Accidents

[5] The relevant part of § 39, as appearing in the Tercentenary Edition of the General Laws, codified in 1932, provided:

> When the appointment of a legal representative of a deceased employee, not otherwise necessary, is required to comply with this chapter, the insurer shall furnish or pay for legal services rendered in connection with the appointment of such representative. . . .

[6] We note whatever services the claimant performs (and expenses she incurs) to dispose of the automobile and probate the estate apart from this case are not properly the subject of a § 39 order.