COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024421-04**

Roger Adam	Employee
Harvard University	Employer
Harvard University	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, McCarthy and Horan)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee on appeal
Thomas P. O'Reilly, Esq., for the self-insurer

KOZIOL, J. The employee appeals from a decision denying his claim for disfigurement benefits pursuant to G. L. c. 152, § 36(1)(k),[1] and assessing costs against his attorney pursuant to § 14(1), for prosecuting that claim without reasonable grounds. We affirm the decision.

The employee injured his right major shoulder on August 6, 2004, while employed as a maintenance worker for Harvard University. An earlier hearing decision, issued by the same judge, established liability for the shoulder injury and

[1] General Laws c. 152, § 36, provides, in relevant part:

> (1) In addition to all other compensation to the employee shall be paid the sums hereafter designated for the following specific injuries; provided, however, that the employee has not died from any cause within thirty days of such injury:
>
> . . .
>
> (k) For bodily disfigurement, an amount which, according to the determination of the member or reviewing board, is a proper and equitable compensation, not to exceed fifteen thousand dollars; which sum shall be payable in addition to all other sums due under this section. . . .

awarded the employee ongoing weekly § 35 partial incapacity benefits. (2/26/07 Dec. 7.)

On October 30, 2007, the employee filed a claim seeking § 36 benefits for loss of function and disfigurement of the right major upper extremity. On November 28, 2007, the parties executed a Form 113, Agreement to Pay Compensation, resolving the loss of function portion of the employee's claim. (Dec. 5.) However, the self-insurer continued to deny the claim for disfigurement, which was based on alleged atrophy of the employee's right major forearm.[2] Following a § 10A conference, the judge denied the disfigurement claim and the employee appealed. (Dec. 2.) Pursuant to § 11A, the employee was examined by Dr. Joel Saperstein on March 26, 2008. Dr. Saperstein measured the circumference of the employee's forearms and recorded them as equal. (Dec. 7.)

The issue in dispute at hearing was whether the employee's right forearm was disfigured, and if so, what amount constituted "proper and equitable compensation" for that disfigurement. G. L. c. 152, § 36(1)(k). Although the parties did not submit the case to the judge on an agreed statement of facts, at his attorney's direction, the employee did not appear at the hearing or testify. The judge informed the parties that he was joining, sua sponte, the issue of unreasonable claim or defense under § 14(1), and noted "employee counsel has released her client, he's not here at this proceeding."[3] (Tr. 7.) Employee's

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[2] Pursuant to 452 Code Mass. Regs. § 1.07(2)(i)(2), and in support of the § 36(1)(k) portion of the employee's claim, employee's counsel's affidavit, attached to the Form 110 Employee's Claim, asserted the employee's right major forearm was disfigured based on measurements recorded by Dr. Robert Pennell in his July 10, 2007 report, which indicated the employee's right forearm was one quarter of an inch smaller in circumference than his left. (Form 110; Dec. 8.)

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

counsel then argued a motion to strike Dr. Saperstein's report on the ground, among others,[4] that the judge's prior hearing decision was erroneously sent to the doctor, thereby "tainting" the report. (Dec. 3-4; Tr. 13-15.) Accordingly, employee's counsel sought permission to submit additional medical evidence, in particular, the report of the employee's physician, Dr. Pennell. The judge denied the motion and marked Dr. Pennell's July 10, 2007, report for identification purposes only. (Dec. 2, Employee Ex. 4; Tr. 26.) Lastly, at the employee's request, the judge took judicial notice "of the entire board file including the conciliation notes and the prior hearing decision." (Dec. 2; Tr. 27.) The hearing concluded without any testimony being taken.

In his decision, the judge found:

> In the claim before me it is alleged that the employee has a permanent disfigurement consisting of atrophy of the right arm. The employee did not attend the hearing or testify. I was not able to observe the alleged atrophy. There is no lay testimony before me on this issue.

(Dec. 6.) With respect to the § 14(1) issue, the judge found:

> I joined the issue of Section 14 sua sponte. In the employee's claim James Ellis, Esq. by affidavit claimed Section 36(k) [sic] benefits in the amount of $7000.00 based on measurements by Robert R. Pennell, M.D. on July 10, 2007 of the employee's arms that were symmetrical with the exception of the forearm where the right major forearm was one quarter inch less than the left in circumference.[5] There is no indication anywhere in Dr. Pennell's report that it is his opinion that the measured amounts were permanent. Further, at hearing, the employee did not attend and testify and show the court his alleged disfigurement. The claim is that the work related injury caused a permanent disfigurement. A prime means of proving this would be to allow the court to view the disfigured body parts. The

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[4] The employee also argued the report should be stricken because no impartial examination should have been conducted in this case, and the impartial medical examiner's opinion was contrary to Dr. Pennell's report and the recommendation of a conciliator. (Tr. 8-13.)

[5] At the hearing, employee's counsel sought $1,768.92 as the amount due for the alleged disfigurement. (Tr. 6-7.)

> employee through his counsel chose not to do this. I find that the employee's failure to testify and failure to present any evidence at hearing that the employee has a disfigurement compensable pursuant to Section 36(k) [sic] constitutes prosecuting a claim at Hearing without reasonable ground.

(Dec. 8.) The judge awarded the self-insurer the costs of defense, which he equated as being commensurate with the hearing fee employee's counsel would have been awarded had the employee prevailed, $5,233.64. (Dec. 8-9.)

On appeal, the employee challenges the judge's refusal to strike the impartial report and admit additional medical evidence, arguing the impartial medical examiner's report was fatally "tainted" by his review of the judge's prior hearing decision. Barrett v. Kiewit Atkinson Cashman, 19 Mass. Workers' Comp. Rep. 286 (2005). We need not reach this issue, because any error the judge may have committed by failing to strike the report is harmless under the circumstances.

"[The] employee has the burden of establishing, by a preponderance of the evidence, all the elements of [his] claim for workers' compensation benefits . . . and . . . [he] cannot prevail if any critical element is left to surmise, conjecture or speculation or otherwise lacks evidential support." Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000), citing Sponatski's Case, 220 Mass. 526, 527-528 (1915). Notwithstanding the denial of his motion to strike, the employee still had the burden of presenting evidence to support his claim. See e.g., Okraska v. Universal Plastics, 23 Mass. Workers' Comp. Rep. 193 (2009)(after full hearing and decision on merits of claim, employee appealed judge's refusal to grant motion to strike impartial opinion); Amoroso v. University of Mass. Med. School, 19 Mass. Workers' Comp. Rep. 233, 235-237 (2005)(after hearing and decision on merits, employee appealed judge's failure to grant motion to strike impartial opinion on grounds of bias); Cramer v. Wal-Mart, 12 Mass. Workers' Comp. Rep. 316, 317-319 (1998)(same).

Bodily disfigurement is defined as "the abnormal *appearance* of a body part." A.M.A. Guides to the Evaluation of Permanent Impairment (6th ed. 2008)(emphasis added). In addition, § 36(1)(k) expressly requires the judge to determine the "proper and equitable compensation," or monetary value of the bodily disfigurement. Thus, the inquiry under § 36(1)(k) presents factual questions which necessarily are dependent on the judge's ability to assess the employee's appearance.[6] See Magalhaes v. Modern Continental Constr., 8 Mass. Workers' Comp. Rep. 199, 202 (1994). As the judge found, the employee could have proven his disfigurement by appearing at the hearing. (Dec. 8.) He chose not to do this, but instead moved unsuccessfully to strike the impartial report and submit additional medical evidence. The result was the absence of any evidence--lay or medical--to support his claim that his right arm was disfigured due to atrophy. Cf. Corriveau v. Specialty Coating, 10 Mass. Workers' Comp. Rep. 92, 93-94 (1996)(case tried on stipulation of facts which not only described the disfigurement but also set forth the precise amount due under § 36[1][k]). By failing to appear at the hearing, the employee also denied the insurer the opportunity to exercise its due process right to challenge his allegation of disfigurement. See Ferreira v. Forrest Homes of MA, 22 Mass. Workers' Comp. Rep. 125, 128 (2007)(employee's argument that he could go forward only on basis of favorable § 11A report, without supporting lay testimony, violated insurer's right to challenge factual foundation of doctor's opinion), aff'd Ferreira's Case, 75 Mass. App. Ct. 1101 (2009)(Memorandum & Order Pursuant to Rule 1:28).[7] By

[6] Department rules require a medical report describing the alleged disfigurement in detail, see 452 Code Mass. Regs. § 1.07(2)(i)(2). This does not mean, however, that the administrative judge is precluded from making his own conclusions, adequately supported by subsidiary findings of fact, with respect to § 36(1)(k).

[7] We observe that any error the judge may have made in adopting Dr. Saperstein's opinion in support of his denial and dismissal of the employee's claim, (Dec. 7), was harmless under the circumstances. See Ferreira's Case, supra (dismissal of employee's

failing to go forward with any evidence, the employee failed to prosecute his claim.

The employee also alleges the judge erred in determining his counsel prosecuted the claim without reasonable ground. (Dec. 8.) The appropriate standard for determining whether proceedings have been prosecuted "without reasonable grounds" under § 14(1) is "an objective 'cautious and prudent person standard.' " Gonsalves v. IGS Store Fixtures, Inc., 13 Mass. Workers' Comp. Rep. 21, 24-25 (1999). Employee's counsel dismissed the employee prior to hearing, despite the fact the claim before the judge concerned the highly factual question of the value of the employee's alleged disfigurement. See Magalhaes, supra. His absence resulted in the creation of a record devoid of any evidence supporting his claim, and thus the employee had no reasonable ground to believe he could succeed. The judge did not act arbitrarily and capriciously, or abuse his discretion, in ordering employee's counsel to pay the whole cost of the proceeding.[8] See Packard v. Swix Sport USA, Inc., 22 Mass. Workers' Comp. Rep. 305, 310 (2008), aff'd Packard's Case, 76 Mass.App. Ct. 1115 (2010) (Memorandum & Order Pursuant to Rule 1:28)(affirming order of § 14(1) costs against employee's counsel for frivolous, and thus unreasonable, pursuit of claim); Ferreira's Case, supra (affirming reviewing board's assessment of costs against employee counsel for pursuing appeal without reasonable grounds).

Accordingly, we affirm the denial of the employee's claim for § 36(1)(k) benefits, and the order of costs against employee's counsel.

So ordered.

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case for lack of prosecution where employee's failure to appear deprived insurer of its due process right to confrontation and rebuttal).

[8] The employee does not argue the *amount* of the costs assessed by the judge was unreasonable; therefore, we do not disturb the judge's finding on that issue. See 452 Code Mass. Regs. § 1.15(4)(a)(3)("Reviewing Board need not decide questions or issues not argued in the brief"). See Rezendes v. City of New Bedford Water Dep't., 21 Mass. Workers' Comp. Rep. 47, 50-51 n.2 (2007)(issue not appealed is deemed waived).

Catherine Watson Koziol
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: