COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025030-96**

Craig M. Richards	Employee
Ultimate Chimney Sweep	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Wilson)

APPEARANCES
Michael M. Kaplan, Esq., for the employee
Nicole M. Edmonds, Esq., for the insurer on appeal
Thomas E. Fleischer, Esq., for the insurer on appeal
Richard E. McCue, Esq., for the insurer at hearing

MAZE-ROTHSTEIN, J. The employee appeals a decision that dismissed his claim for workers' compensation benefits allegedly due to a fall off a ladder at work on May 10, 1996. The same decision also denied the insurer's claim for G.L. c. 152, § 14(2), penalties for the employee's alleged fraudulence. Mr. Richards contends error in the failure to award him § 13A(5) attorney's fee for prevailing on the fraud claim. We summarily affirm the decision as to the arguments that the denial of weekly benefits was arbitrary, capricious and contrary to law. The decision is grounded in credibility findings that are supported by the evidence. See Chinetti v. Boston Edison Co., 13 Mass. Workers' Comp. Rep. 328, 331 (1999). For the reasons that follow we reverse the denial of a § 13A(5) attorney's fee, and recommit the case for the appropriate assessment thereof.

An attorney's fee, pursuant to § 13A(5), is due "[w]henever an insurer files a complaint or contests a claim for benefits and . . . the employee prevails at [the § 11] hearing . . . ." We have concluded that an employee is entitled to an attorney's fee when he successfully defends against an insurer's claim of § 14(2) fraud. Talbot v. Stanton

Tool & Mfg., Inc., 11 Mass. Workers' Comp. Rep. 528, 530 (1997). In that case, we surveyed the relevant case law and applied it to the same operative facts as we do here:

> We take direction from the recent Appeals Court holding that an employee's successful defense of a conference order of a closed period of benefits, against an insurer's appeal to a *de novo* hearing challenging such award, entitles the employee to a § 13A(5) fee. Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996). The rationale of the Appeals Court in reaching that conclusion was that, in proving his entitlement to the benefits already awarded, the employee has "prevailed" at the *de novo* hearing by defeating the possibility of an insurer's recoupment of those benefits, pursuant to § 11D(3). [Footnote omitted.] Id. at 37-38. That rationale applies here where the employee was faced with the possibility of a substantial assessment of costs and penalties, together with potential criminal prosecution, in the event the insurer prevailed in its § 14 complaint. Indeed, to interpret "the employee prevails" in § 13A(5) as being inapposite to this case seems to fly in the face of common sense. "[T]he employee falls within the typical 'prevailing party' formulation of one who succeeds on any significant litigation issue, achieving 'some of the benefit' sought in the controversy." Connolly's Case, [41 Mass. App. Ct. 35, 37 (1996)], quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978). If the employee's avoiding thousands of dollars of costs and penalties and criminal prosecution is not " 'some of the benefit' sought in the controversy," we do not know what is.

Talbot, id. at 530. Under this analysis, a § 13A(5) fee would be plainly due in the present case.

The recent Appeals Court opinion in Cruz's Case, 51 Mass. App. Ct. 26 (2001), is in accord with the Talbot approach. Cruz addressed the application of our departmental regulation, 452 Code Mass. Regs. § 1.19(4),[1] to an insurer's discontinuance complaint that resulted in a reduction of weekly benefits. Id. at 26-27. The effect of the regulation was to award a § 13A(5) fee for the employee's "prevailing," even though the result of the hearing was *less* for the employee than before that proceeding. Id. at 28-29. See also Conroy v. Norwood Hosp., 14 Mass. Workers' Comp. Rep. 130 (2000)(on an insurer's

[1] That regulation, effective May 8, 1992, provides in pertinent part: "In any proceeding before the division of dispute resolution, the claimant shall be deemed to have prevailed, for the purposes of M.G.L. 152, § 13A[5], when compensation is ordered or is not discontinued at such proceeding . . . ."

complaint for discontinuance, weekly benefits were terminated on the date of the § 11A examination; employee, thus, successfully defended benefits from the date of the complaint through the medical examination date)(Appeals Ct. docket No. 00-J-353, appeal filed June 7, 2000); and Conroy v. Norwood Hosp., 11 Mass. Workers' Comp. Rep. 487, 491 (following Connolly's Case, supra, to overrule all prior reviewing board precedent interpreting § 1.19[4] more narrowly). In cases where a successful defense of some weekly benefits has occurred the language of § 1.19(4) can be read as covering such instances of "prevailing." Id. However, we determined in Talbot, supra, that § 1.19(4) could not be applied in cases – such as the present one – in which the insurer seeks to assess penalties on the employee:

> We acknowledge the utility of regulation § 1.19(4) for interpreting § 13A(5) in ordinary compensation claims and discontinuance complaints. Nonetheless, that does not change the fact that the regulation is in "explicit contradiction" to the statute, with respect to this insurer's complaint under § 14 of the Act as discussed above. See G.L. c. 152, § 5.[2] . . . [R]eliance placed on the regulation [in ordinary proceedings within the division] does not contravene our decision to report the regulation as unenforceable in this case.

Talbot, supra at 532 (footnote in original). As in Talbot, supra, we report that regulation § 1.19(4) is unenforceable in this proceeding, due to "the explicit contradiction found between the regulation and this chapter." G.L. c. 152, § 5. See Appendix "A."

However, the Appeals Court has also rejected – post-Talbot – the award of § 13A(5) fees in the context of an employee who defended against an insurer's complaint for recoupment with a modicum of success. In Mueller's Case, 48 Mass. App. Ct. 910 (1999)(rescript), the Appeals Court held, "[t]hat, upon accounting, the amount due

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[2] General Laws c. 152, § 5, amended by St. 1996, c. 337, § 2, provides, in pertinent part:

> [I]f in any proceeding within the division of dispute resolution it is found that the application of any section of this chapter is made impossible by the enforcement of any particular regulation, the administrative judge or reviewing board shall not apply such regulation during such proceeding only. In any case in which a regulation is not applied as herein provided, the administrative judge or reviewing board shall, on or before the date of the issuance of the decision, inform the commissioner in writing of the explicit contradiction found between the regulation and this chapter.

[being] $ 6,669.65 less than the insurer had first calculated does not make the employee the prevailing party under G.L. c. 152, § 13A(5)." The court's rationale followed: "He still had to disgorge $ 11,128.06. Generally, an employee has prevailed in a workers' compensation case only when a payment of compensation has been ordered." Id., citing Gonzalez's Case, 41 Mass. App. Ct. 39, 42 (1996).

While we acknowledge it as a close call, we consider Mueller distinguishable from the present case. Here, the denial of the insurer's § 14 fraud complaint was an unequivocal and unambiguous success on a significant litigation issue. See Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996). In Mueller, on the other hand, the employee still had to "disgorge" a significant amount of money in recoupment to the insurer, albeit less than the insurer sought in its complaint. We understand the court's opinion to stand for the proposition that Mueller's limited success in defending against the complaint did not meet the Connolly standard for "prevailing" under § 13A(5), namely, success on a "significant litigation issue." Id. at 37. As already noted, there can be no reasonable argument that the present employee did not meet that standard, as he walked away from the fraud allegation, as it were, "Not Guilty." We therefore continue to follow Talbot, supra, and conclude that a § 13A(5) attorney's fee is due.

The Gonzalez interpretation of § 13A(5), also cited in Mueller, that "[g]enerally, an employee has prevailed in a workers' compensation case only when a payment of compensation has been ordered," Gonzalez, supra,[3] as a *general* proposition, is, of course, quite correct. However, its application to bar a § 13A (5) fee in the atypical case, such as the present one, would lead to untenable results.

There is no dispute that, without a § 13A (5) fee *ever* being due the employee in an insurer's single issue complaint for fraud or recoupment, as these do not involve the award of compensation, employees defending against these complaints necessarily have *pro bono* representation or none at all. There can be no other fee arrangement under the

[3] The regulation upon which Gonzalez based its holding, 452 Code Mass. Regs. § 1.19(4), is also questionable in its narrowing of the scope of § 13A(5) to apply only to claims involving the award of compensation, as we pointed out in declining to apply it in Talbot.

Act. "The attorney's fees specified in this section [13A] *shall be the only fees payable for any services provided to employees under this chapter* unless otherwise provided by an arbitration agreement pursuant to section ten B." G.L. c. 152, § 13A(10)(emphasis added.) However, there is equally no question that § 13A(5)'s language is broad enough to allow for fee awards in both the Talbot- and the Mueller-type cases: "Whenever an insurer *files a complaint* or contests a claim for benefits . . . ." (Emphasis added.) Cf. § 13A(4)(regarding § 10A conference fees, statute limits scope to "[w]henever an insurer files a complaint *to reduce or discontinue an employee's benefits* or whenever an insurer contests a claim for benefits . . . .") (Emphasis added.) Thus, limiting fees under § 13A(5) only to awards of compensation would appear to unduly restrict the scope of that subsection, to the unfair disadvantage of a class of litigants.

Authority counsels against such an interpretation. In Murphy v. Commissioner of the Dept. of Indus. Accidents, 415 Mass. 218 (1993), the Supreme Judicial Court ruled there was a violation of equal protection under the fourteenth amendment of the United States Constitution and Art. 11 of our Declaration of Rights in the 1991 § 11A statute, which initially made the doctor's examination fee payable for employees with attorneys, but not for *pro se* employees. Analyzing the statute under the "rational basis" standard, the court concluded that the statute singled out a classification of claimants – namely those who were represented by counsel – for arbitrary and capricious treatment. Id. at 232-233. The instant interpretation of § 13A(5) does the same, by removing employees defending against insurer's complaints for recoupment and § 14 fraud from the scope of § 13A(5), thereby leaving them effectively without representation.[4] See Murphy, supra at 231 n. 19, citing English v. New England Medical Ctr., Inc., 405 Mass. 423, 429 (1989) ("substantial burden which [this interpretation] place[s] on the ability of a workers' compensation claimant to be heard with the aid of skilled counsel"). As the Murphy court saw fit to summon the wisdom of Rugg, C.J., so do we:

[4] Statutes normally should be construed in such a way as to avoid constitutional problems. Brossi v. Fisher, 51 Mass. App. Ct. 543, 548 (2001).

> It is an essential element of equal protection of the laws that each person shall possess the unhampered right to assert in the courts his rights, without discrimination, by the same processes against those who wrong him as are open to every other person. The courts must be open to all upon the same terms. No obstacles can be thrown in the way of some which are not interposed in the path of others. Recourse to the law by all alike without partiality or favor, for the vindication of rights and the redress of wrongs, is essential to equality before the law.

Murphy, supra, quoting Bogni v. Perotti, 224 Mass. 152, 156-157 (1916). Since application of the Mueller/Gonzalez rule § 1.19(4) interpretation of § 13(5) singles out a class of litigants for "arbitrary and irrational" treatment when seeking legal relief made available by the State, we would expect that it would not pass constitutional muster. Murphy, supra at 233 n. 31, quoting Paro v. Longwood Hosp., 373 Mass. 645, 654 (1977). Cf. Ahmed's Case, 278 Mass. 180, 186-188 (1932)(statute conferring right to costs only to employees held a valid classification in furtherance of Act's beneficent design, and not violative of fair play and equality before the law). See generally Neff v. Commissioner of Dept. of Indus. Accidents, 421 Mass. 70 (1995).

We reverse the § 13A(5) fee denial and recommit the case for assessment thereof.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

Filed:

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Sara Holmes Wilson
Administrative Law Judge

APPENDIX "A"

DATE

Thomas J. Griffin, III, Commissioner
Commonwealth of Massachusetts
Department of Industrial Accidents
600 Washington Street
Boston, MA 02111

RE: Employee: Craig Richards
Employer: Ultimate Chimney Sweep
Insurer: Liberty Mutual
D.I.A.#: 025030-96

Dear Commissioner Griffin:

The reviewing board will soon issue its decision in the above named case. In the course of deciding the issues raised on appeal, we determined that the application of § 13A(5) of c. 152 is made impossible if 452 Code Mass. Regs. § 1.19(4) is enforced. Accordingly, we do not apply that regulation in the instant case.

Pursuant to G.L. c. 152, § 5, please be advised that in our opinion there is an explicit contradiction between the cited regulation and § 13A(5). The regulation appears to define the term "prevail" too narrowly to allow the proper application of § 13A(5) to the circumstances of this case.

Sincerely,

_____
Susan Maze-Rothstein
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

MCCARTHY, J. dissenting Entitlement to fees for legal services rendered to employees is established and regulated by G.L. c. 152, § 13A. Section 13A(10) provides in pertinent part that "[t]he attorneys' fees specified in this section shall be the only fees payable for any services provided to employees under this chapter unless otherwise provided by an arbitration agreement pursuant to section ten B." Fees to employee counsel for legal services rendered at conference and hearing are governed under the provisions of § 13A(4) and (5). These sections provide that fees are earned when the employee prevails in a claim for benefits or succeeds in fending off an insurer's effort to discontinue benefits. Rare is the case which does not involve the payment or discontinuance of benefits. The applicable board rule, 452 Code Mass. Regs. § 1.19(4), interprets these sections in the context of an award or discontinuance of benefits.[5]

In the case at hand, the employee only succeeded in escaping the payment of a penalty under § 14. Mr. Richards' claim for benefits was denied. In my view, the claim for a legal fee under §13A(5) should likewise be denied. In Talbot v. Stanton Tool & Mfg., Inc., 11 Mass. Workers' Comp. Rep. 528 (1997), a reviewing board panel awarded an attorney's fee where the employee failed in his claim for further weekly benefits but successfully defended against a claim of § 14 fraud. I disagree with the reasoning and the outcome in that case.[6] In particular, I disagree with the effort to distinguish Gonzalez's Case, 41 Mass. App. Ct. 39 (1996). Gonzalez succeeded in establishing that he suffered an industrial injury arising out of and in the course of his employment. That is at least as consequential as defeating an allegation of fraud.[7] He failed, however, in his quest for

[5] Rules and regulations are supposed to be consistent with the statute(s) being implemented. They should not expand the reach of the law to which they refer. Thus, the rule under scrutiny properly interprets the word "prevails" only in the context of the payment of benefits.

[6] I was not a member of the panel which heard and decided Talbot.

[7] The employee in the present case testified that he fell two stories from a roof and landed on his back and buttocks. (Dec. 4, 5.) Other witnesses contradicted this testimony. The administrative judge refused to credit or accept Mr. Richards' testimony yet finds no § 14 violation. (Dec. 9.)

payment of weekly benefits. The Gonzalez court denied the claim for counsel fees saying:

> Under the Workers' Compensation Act, the most significant aspect of a claim is the payment of compensation. We decline to interpret the statute as providing attorney's fees in cases where no workers' compensation has been ordered at any stage of the statutory proceedings. . . . Because Gonzalez did not lose any wages as a result of his injury, there was nothing to compensate. The fact that the administrative judge found that the insurer *would have been liable* to Gonzalez if he had lost wages, does not mean that he prevailed. Therefore, the board's decision not to award Gonzalez any benefits means that Gonzalez did not prevail and is not entitled to any statutory attorney's fees.

The Gonzalez holding was followed more recently in Mueller's Case, 48 Mass. App. Ct. 910 (1999). I would follow Gonzalez, Mueller and 452 Code Mass. Regs. §1.19(4) and decline to award an attorney's fee under §13A.

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William A. McCarthy
Administrative Law Judge