COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 005069-94

Edward A. Auger	Employee
August A. Busch & Company of Massachusetts	Employer
Anheuser Busch Company, Inc.	Self-Insurer

REVIEWING BOARD DECISION

(Judges Horan, Carroll and McCarthy)

APPEARANCES

Joseph M. Burke, Esq., for the employee
John C. White, Esq., for the self-insurer at hearing and on brief
Richard W. Jensen, Esq., for the self-insurer on brief

HORAN, J. The sole issue on appeal is whether employee's counsel is entitled to a fee for successfully defending against the self-insurer's complaint for recoupment.[1] We affirm the attorney's fee award.

The employee sustained a work-related injury on February 15, 1994, and the self-insurer voluntarily paid weekly § 34 benefits. The self-insurer then filed a complaint to modify or discontinue benefits, which resulted in a conference order authorizing it to pay § 35

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[1] G. L. c. 152, § 11D(3) provides:

> An insurer that has paid compensation pursuant to a conference order, shall, upon receipt of a decision of an administrative judge or a court of the commonwealth which indicates that overpayments have been made[,] be entitled to recover such overpayments by unilateral reduction of weekly benefits, by no more than thirty percent per week, of any remaining compensation owed the employee. *Where overpayments have been made that cannot be recovered in this manner, recoupment may be ordered pursuant to the filing of a complaint pursuant to section ten or by bringing an action against the employee in superior court*. (Emphasis added.)

benefits. Both parties appealed to a full evidentiary hearing. A hearing decision filed on October 23, 1996 retroactively adjusted the periods of compensation due, resulting in a $7,502.52 overpayment to the employee. Shortly after receipt of the hearing decision, the employee returned to work with the employer.[2] (Dec. 3.)

The self-insurer then filed a recoupment complaint pursuant to § 11D(3). (Dec. 1, 3.) The complaint was denied at conference, and the case was tried at a second hearing on an agreed statement of facts. (Dec. 1-4.) The administrative judge again denied the self-insurer's complaint for recoupment, and ordered it to pay a reasonable attorney's fee to employee's counsel pursuant to G. L. c. 152, § 13A(5). (Dec. 7.)

Section § 13(A)(5) provides, in relevant part: "[w]henever an insurer files a complaint . . . and . . . (ii) the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney . . . ." Accordingly, the issue of fee entitlement here turns on whether the employee can be said to have "prevailed" on the self-insurer's recoupment complaint.

The self-insurer argues § 13A(5) does not authorize payment of an attorney's fee where, as here, the employee successfully defends against a complaint for recoupment alone. Rather, the self-insurer maintains, the employee must also prevail on a challenge to his benefit entitlement to warrant counsel fees. Alternatively, the self-insurer maintains § 13A(5) authorizes an attorney's fee only in a proceeding wherein the employee prevails on a claim for benefits.

The self-insurer's arguments are defeated by a plain reading of §13A(5), and the court's decision in Richards's Case, 62 Mass. App. Ct. 701 (2004). In Richards, the court held that:

> General Laws c. 152, § 13A(5) plainly and unambiguously provides for an attorney's fee award in two distinct scenarios . . .: "[w]henever an insurer [a] files a complaint *or* [b] contests a claim for benefits" and the employee prevails against the complaint or contest.

(Emphasis in original) Id. at 705-706. The self-insurer in Richards had filed both a § 14(2) fraud complaint, and a denial of liability for the employee's injuries. Id. at 706. The administrative judge agreed with the self-insurer that the employee failed to prove his

[2] The hearing decision was summarily affirmed by this board on October 28, 1997, and later affirmed by the Appeals Court on December 6, 1999.

case, and denied and dismissed the employee's claim for benefits. However, the judge also denied the insurer's fraud complaint, and awarded a fee under § 13(A)(5). Id. at 703. Therefore, "[t]he employee unquestionably prevailed with respect to the § 14 fraud complaint, achieving . . . 'an unequivocal and unambiguous success' against that complaint." Id. at 706, quoting Richards v. Ultimate Chimney Sweep, 15 Mass. Workers' Comp. Rep. 301, 304 (2001).

In this case the employee also prevailed, achieving "an unequivocal and unambiguous success" by successfully defending against the self-insurer's recoupment complaint. We see no reason to treat this scenario differently than the employee's successful defense of the insurer's fraud complaint in Richards's Case. Both types of complaints, initiated by the insurer, put the employee's financial resources in jeopardy. An employee's chance of success in these cases is, without a doubt, enhanced by the assistance of skilled legal counsel.[3] The self-insurer's reliance on Mueller's Case, 48 Mass. App. Ct. 910 (1999), is misplaced. An employee need not, in all instances, retain all or part of an award of weekly benefits to justify a fee award under the statute. Richards, supra; Talbot v. Stanton Tool & Mfg., Inc., 11 Mass. Workers' Comp. Rep. 528 (1997). The court's rationale in Richards was not dependent upon the fact that the employee also sought weekly indemnity benefits at hearing.[4] In fact, in that case the employee *lost* his

[3] "There is no dispute that, without a § 13(A)(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." Richards v. Ultimate Chimney Sweep, supra, at 305, (emphasis in original).

[4] The court in Richards approved our refusal to apply 452 Code Mass Regs. § 1.19(4) to restrict § 13A's scope, and affirmed our opinion that the rule is inapplicable in cases which do not involve ordinary compensation claims or discontinuance requests. supra, at 706 and n. 14. Cf. Conroy's Case, 61 Mass. App. Ct. 268 (2004)(hearing fee due where employee retained right to ten weeks of benefits against possible recoupment); Cruz's Case, 51 Mass. App. Ct. 26 (2001)(hearing fee due even though insurer successfully reduced benefits; causation still an issue, thus placing the employee's entire claim in jeopardy; 452 Code Mass. Regs. § 1.19(4) cited); Connolly's Case, 41 Mass. App. Ct. 35 (1996)(award of benefits to employee partially confirmed, fee due as insurer had appealed, placing benefits awarded at conference at risk, 452 Code Mass. Regs. § 1.19(4) cited).

previously awarded benefits. The *only* basis for the fee award was the successful defense of the fraud complaint. See also Talbot, supra.

Finally, the self-insurer argues that because it *could* have filed an action for recoupment in the superior court,[5] [5]where "there is no corresponding statutory provision" for attorney's fees, no fee is due under § 13(A)(5). (Self-insurer br. 8.) We need not reach the issue of whether attorney's fees would have been due in the superior court, as it was the self-insurer who chose to litigate its recoupment complaint at the department.

Accordingly, we affirm the decision of the administrative judge. Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,312.21.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: February 3, 2005

[5] See footnote 1, supra.