

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 035272-06

Eugene McGahee
Milton Bradley
Hasbro, Inc.

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Murphy.

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Frederica H. McCarthy, Esq., for the self-insurer

KOZIOL, J. This employee's appeal presents the sole issue of whether the judge erred by failing to order the self-insurer to pay his attorney a hearing fee under G. L. c. 152, § 13A(5). For the reasons that follow, we conclude the judge erred in failing to award the fee.

The employee claimed benefits for an emotional disability arising out of a series of incidents at work. The self-insurer rejected the claim and raised the issue of § 14(1) penalties,¹ alleging the employee's claim was brought without reasonable grounds.² (Dec. 2.) The judge listed the § 14(1) issue but failed to make any findings or order addressing its merits.

¹ General Laws c. 152, § 14(1), states, in pertinent part:

If any administrative 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.

² We need not recount the underlying facts because the judge's denial and dismissal of the employee's claim is not the subject of his appeal.

The self-insurer did not appeal from the decision. As such, its argument that the case should be recommitted for findings on its § 14(1) claim, (Self-ins. br. 3-4), necessarily fails. Boston Edison v. Boston Redevelopment Authy., 374 Mass. 37, 43 n.5 (1977)(failure to cross-appeal forecloses appellee's attainment of better result than it received below); see also Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep. 415, 418-419 (2009)(failure to appeal from conference order deemed acceptance of order); Bland v. MCI Framingham, 23 Mass. Workers' Comp. Rep. 283, 289 (2009); Gelin v. Vinny Testa's Restaurant, 22 Mass. Workers' Comp. Rep. 221, 223 n.3 (2008). The only question is whether a § 13A(5) fee is due for the employee's successful defense against that claim. We conclude that it is. Vazquez v. Target Corp., 23 Mass. Workers' Comp. Rep. 359, 365 (2009)(employee prevails when he defends against and defeats an insurer's § 14[1] claim, requiring payment of a § 13A[5] attorney's fee); see Richards's Case, 62 Mass. App. Ct. 701, 707-708 (2004).

General Laws c. 152, § 13A(5), provides, in pertinent part:

Whenever an insurer files a complaint . . . and then . . . withdraws its own complaint within five days of the date for a hearing pursuant to section eleven; or [] the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney . . . 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.

Having met the requirements of both options set forth in § 13A(5), the employee has established a right to an attorney's fee. First, the employee can be seen as having prevailed in defending against the self-insurer's claim for a § 14(1) penalty by virtue of the absence of an order requiring him to pay such a penalty. The situation is analogous to that of a judge failing to rule on a motion, which can be construed as a denial of the motion. See Haslam v. Modern Continental Constr. Co., 20 Mass. Workers' Comp. Rep. 41, 57 (2006), reversed on other grounds, Haslam's Case, 451 Mass. 101 (2008). Alternatively, the self-insurer's failure to appeal from the decision which does not address its § 14(1) claim, see General Laws c. 152, § 11B ("Decisions

. . . shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision”), constitutes an effective withdrawal or abandonment of its claim. See Vallieres, supra; Bland, supra; Gelin, supra.

Because the judge erred by failing to award the employee a § 13A(5) attorney’s fee, we award that fee in the amount of \$5,209.00.³

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **September 27, 2011**

³ Circular Letter 336, issued October 6, 2010 and applicable on the date the judge’s decision was filed, increased the legal fee due an employee’s attorney to \$5,209.00. General Laws c. 152, § 13A(10)(providing for the yearly adjustment of attorney’s fees payable under § 13A[1]-[6] on October first of each year).