COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009841-98**

Ferengbeh Mansaray	Employee
City Foods	Employer
Massachusetts Retail Merchants WC Group	Insurer
Brailey E. Newton	Third Party Claimant

REVIEWING BOARD DECISION

(Judges Levine, McCarthy and Maze-Rothstein)

APPEARANCES

Brailey E. Newton, Esq., pro se
Richard N. Curtin, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on brief

LEVINE, J. The employee's attorney, third party claimant, appeals from the decision of an administrative judge denying payment of attorney's fees. The attorney contends that the timing of the insurer's acceptance of the employee's claim triggered his entitlement to attorney's fees. We agree and reverse the decision of the administrative judge.

On March 1, 1998, while in the course of her employment, Ferengbeh Mansaray fell injuring her elbow, back, neck and shoulder. Pursuant to § 10A, the employee's claim for compensation was conferenced before an administrative judge. The claim was denied and the employee appealed to a de novo hearing. (Dec. 20.) A hearing date was set for February 23, 2000. (Dec. 20-21.)

On February 18, 2000, the employee's attorney received from the insurer's attorney

an offer of payment to the employee. The offer was accepted the same day.[1] Accordingly, the hearing did not go forward. (Dec. 21.) Subsequently, the employee's attorney filed a claim for attorney's fees. Pursuant to § 10A, a conference was held before an administrative judge, who awarded the employee's attorney a fee of $1,244.00. Both parties appealed to a hearing de novo. The parties waived testimony, and the case was decided on agreed facts and the law. (Dec. 20.)

General Laws c. 152, § 13A(5), governs this case. That section states, in pertinent part, that "Whenever an insurer . . . contests a claim for benefits and then . . . accepts the employee's claim . . . within five days of the date set for a hearing pursuant to section eleven . . . the insurer shall pay a fee to the employee's attorney in an amount equal to three thousand five hundred dollars plus necessary expenses."

Applying the statute, the judge determined that the offer made and accepted on February 18, 2000 was

> not within five days of the [hearing date]. The five days from the offer and acceptance are February 18, February 19, February 20, February 21 and February 22, 2000. February 23, 2002 [the hearing date] was the sixth day, just outside the statute's five-day provision. The insurer settled the case on the last possible date before section 13A(5) would apply.

(Dec. 22.) Accordingly, the judge ruled that the employee's attorney was not entitled to a fee and ordered that he return the fee of $1,244.00 awarded at the conference. (Dec. 23-24.)

We agree with the appellant that the judge's computation is erroneous. Simple logic dictates the result. If, instead of "within five days," the statute said "within one day of the date set for hearing," it could not be credibly argued that the day of the hearing, February 23, is "within one day" of February 23. Rather, February 22 is within one day of February 23; February 21 is within two days of February 23; February 20 is within three days of February 23; February 19 is within four days of February 23; and February

[1] The parties treat this as an acceptance of the employee's claim within the meaning of G. L. c. 152, § 13A(5).

18 is within five days of February 23. Since the insurer accepted the employee's claim on February 18 and that date is "within five days of the date set for hearing," the employee's attorney is entitled to a fee.

Case law and other authority support the result we reach. "It is the general rule that where time is to be computed from a particular day or from the day of a specified act, such day is excluded and the last day of the period is included in the computation." Daley v. District Court of Western Hampden, 304 Mass. 86, 94 (1939). "It is generally held that the day from which a time period is to be computed is not counted in the computation of the period." Commonwealth v. Cromer, 365 Mass. 519, 521 n. 3 (1974). "[W]here the period is expressed as 'within' a specified time 'before' or 'prior to' a given date or a certain day, the last day or date mentioned is excluded and the first day included in making the calculation." 86 C.J.S. Time § 8 (1997). Excluding the hearing date, February 23, 2000 (the date from which the time is to be computed), but including the date the insurer accepted the claim, February 18, 2000, yields five days (February 18, 19, 20, 21, 22). Since the insurer accepted the employee's claim within five days, employee's attorney is entitled to a fee.[2]

Not content with the fee of $3,500.00, which is subject to a cost of living adjustment, § 13A(10), the employee's attorney sought an enhanced fee "based on the

[2] In Daly, supra, the court went on to state that "In computing the time within which any act may be done, if the period of time is less than one week, a Sunday is excluded." Applying that rule of computation to the present case would reduce by one day the number of days before the hearing date that the insurer accepted the employee's claim because February 20, 2000 was a Sunday. However, the rule excluding Sundays may not apply because of another rule of statutory construction. General Laws c. 152, § 6, requires employers to give notice of certain industrial injuries '[w]ithin seven calendar days, not including Sundays and legal holidays." (Emphasis added.) By specifically excluding Sunday from the calculation in § 6, the legislature may have intended that Sunday be included in the computation in § 13A(5). "[I]n certain situations Sundays and holidays are to be excluded in computing the time and that in a situation like the present they are to be included. Expressio unius est exclusio alterius." Iannelle v. Fire Comm'r of Boston, 331 Mass. 250, 252 (1954). Whether Sunday is included in the calculation or not in the present case, the insurer's acceptance of the employee's claim fell within five days of the hearing date entitling the employee to the attorney's fee.

complexity of the dispute or effort expended by the attorney." G. L. c. 152, § 13A(5). The hearing judge was not impressed:

> This claim is advanced in spite of the fact that he never had to try the case. He lists several reasons for an enhanced fee in his brief. . . . However, a brief is not evidence and this list of work performed is not contained within the agreed statement of facts. Therefore, his claim for an enhanced fee has no supporting evidence that is properly before me.

(Dec. 23.)

We agree with the judge that employee's attorney is not entitled to an enhanced fee. It would likely be an unusual case where a fee would be enhanced where no hearing occurred. Even if we were to consider the merits of the employee's attorney's itemization of his time and expenses spent on this case, (Exhibit 5 to Employee's brief), he would not be entitled to an enhanced fee. Much of the time listed relates to preparation for the original conference; to work occurring after February 23, 2000, the date scheduled for the hearing; and to preparation for the present claim of attorney's fee. "No attorney's fee shall be due for any claim solely involving unpaid attorney's fees or expenses for past services." G.L. c. 152, § 10(1).

Accordingly, we reverse the decision and order the insurer to pay an attorney's fee of $4,263.90, plus necessary expenses, pursuant to §§ 13A(5) and (10). Morgan v. Seaboard Prods., 14 Mass. Workers' Comp. Rep. 280, 284 (2000). Mikel v. M.B.T.A., 14 Mass. Workers' Comp. Rep. 84, 92 (2000).[3]

So ordered.

[3] The hearing judge awarded the employee's attorney a fee of $1,244.00 at conference. (Dec. 20.) This apparently was intended to partially satisfy his claim because after the judge concluded in his hearing decision that the employee was not entitled to any hearing fee, he ordered that the $1,244.00 be returned to the insurer. (Dec. 24.) If the employee's attorney has returned the $1,244.00 to the insurer, then the insurer shall pay the attorney the full $4,263.90. If the $1,244.00 has not been returned to the insurer, then the insurer shall pay the employee's attorney the difference between $4,263.90 and $1,244.00.

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Filed: **May 23, 2002**