

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 028352-05

Gary Poulton
James N. Ellis, Esquire
D. R. Billings Inc.
American Home Assurance Co.

Employee
Third Party Claimant
Employer
Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Koziol)

The case was heard by Administrative Judge Rose.

APPEARANCES

James Riley Hodder, Esq., for the third party claimant at hearing
James N. Ellis, Esq., for the third party claimant on brief
Charles E. Berg, Esq., for the third party claimant at oral argument
Janice Lenczyski Toole, Esq., for the insurer

McCARTHY, J. The third party claimant appeals from a decision in which the administrative judge denied him an attorney's fee for the insurer's acceptance of the employee's claim within five days of the scheduled hearing date. We agree with the third party claimant that the correct method of counting the five-day statutory period under § 13A(5)¹ excludes Saturdays, Sundays and legal holidays. Therefore, we reverse the decision and recommit the case.

The employee's claim for weekly incapacity and medical benefits was scheduled for a § 11 hearing on December 26, 2007, on the insurer's appeal of a conference order of payment. On December 19, 2007, the insurer withdrew its appeal and accepted the employee's claim. The insurer did not pay a hearing fee and in

¹ General Laws c. 152, § 13A(5), provides, in pertinent part:

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.

March 2008, the employee's attorney filed a third party claim for the fee. The judge denied the claim at conference and employee's counsel appealed. (Dec. 1-2.)

The period between the insurer's withdrawal of its appeal and the scheduled hearing included a Saturday, a Sunday and the Christmas holiday. Thus, the question before the judge at hearing on the third party claim was whether the insurer's acceptance occurred within seven days, or four days, of the scheduled hearing.

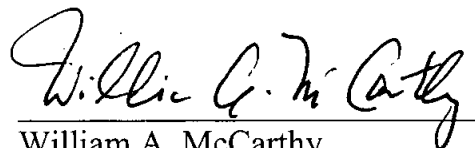
The judge found that all calendar days should be included in the calculation of the time period, concluded the insurer's acceptance fell outside the five-day period for the purpose of entitlement to a § 13A(5) attorney's fee, and denied the third party claim. (Dec. 3.) The judge cited Mansaray v. City Foods, 16 Mass. Workers' Comp. Rep. 210 (2002) in his decision but determined that holding did not assist his analysis of the time period at issue.²

We agree with the third party claimant that the § 13A(5) five-day notice requirement should refer to working days rather than calendar days. We take guidance from the regulatory interpretation of the statute contained in 452 Code Mass. Regs. § 1.19(5), which provides that "withdrawal by an insurer at or after the hearing shall constitute withdrawal within five *working* days of the date set for a hearing pursuant to M.G.L. c. 152, § 11." (Emphasis added.) We also consider that this interpretation is consistent with Massachusetts Rules of Civil Procedure 6(a), which provides "[w]hen the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

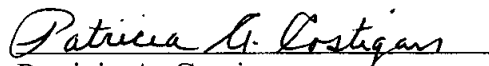
² In Mansaray, the reviewing board pondered in dicta whether Sundays and legal holidays should be included in the calculation of the five-day period under § 13A(5), but determined that "[w]hether Sunday is included in the calculation or not in the present case, the insurer's acceptance of the employee's claim fell within five days of the hearing date. . . ." Supra at 212 n.2.

Accordingly, we reverse the decision. We recommit the case for the judge to determine the amount of the attorney's fee due employee's counsel.³

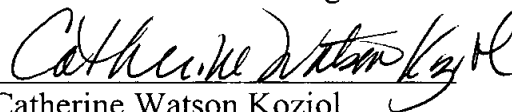
So ordered.



William A. McCarthy
Administrative Law Judge

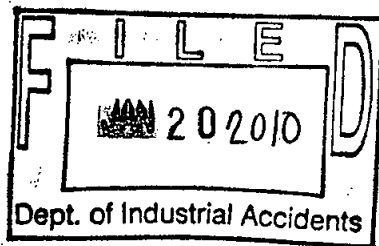


Patricia A. Costigan
Administrative Law Judge



Catherine Watson Koziol
Administrative Law Judge

Filed:



³ The statute also provides: "An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney."