

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 032922-05

James Brown
Department of Youth Services
Commonwealth of Massachusetts

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Fabricant and Horan)

The case was heard by Administrative Judge Benoit.

APPEARANCES

Seth J. Elin, Esq., for the third party claimant
Arthur Jackson, Esq., for the self-insurer

COSTIGAN, J. The employee's attorney appeals from the administrative judge's denial of his third party claim for a fee under the provisions of G. L. c. 152, § 13A(5).¹ The only issue presented by this appeal is the meaning of the statutory phrase, "within five days," relative to an insurer's withdrawal of its appeal. The administrative judge did not have the benefit of our recent decision in Poulton v. D. R. Billings, Inc., 24 Mass. Workers' Comp. Rep. ____ (January 20, 2010), which governs the outcome here. Accordingly, we reverse the decision and recommit the case for further findings.

The self-insurer's complaint to modify or discontinue the employee's § 34 total incapacity benefits was denied following a § 10A conference, and the insurer appealed. In the course of the fee litigation, the parties stipulated the evidentiary hearing was scheduled on Tuesday, July 3, 2007, and the self-insurer withdrew its appeal of the conference order on Tuesday, June 26, 2007. (Dec. 1-2.) Thus, the

¹ Section 13A(5) provides, in pertinent part: "Whenever an insurer files a complaint or contests a claim for benefits and then either (i) accepts the employee's claim or withdraws its own complaint *within five days of the date set for a hearing* . . . the insurer shall pay a fee to the employee's attorney. . . ." (Emphasis added.)

question before the administrative judge was whether the phrase, “within five days,” as appearing in § 13A(5), means “within five calendar days.” (Dec. 1.) As the judge noted, if the intervening Saturday and Sunday, June 30th and July 1st, were excluded in the computation, the self-insurer’s withdrawal would have occurred within five *working* days of the July 3rd hearing, and a fee would be due employee’s counsel. If, however, all calendar days were counted, the June 26th withdrawal was outside of five days prior to the hearing, and no fee was payable. (Dec. 3.)

In Poulton, supra, we concluded “that the § 13A(5) five-day notice requirement should refer to working days rather than calendar days.” Id. We reasoned:

We take guidance from the regulatory interpretation of the statute contained in 452 C.M.R. § 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(1), 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.”

Id. at ____.


The self-insurer argues the reference to “working days” in the regulation has no place in the analysis of the fee dispute in this case, because the withdrawal here was not “at or after the hearing.” We disagree. The self-insurer offers no rationale, nor can we imagine any, that the use of the phrase, “working days,” applies to withdrawals at or after the scheduled hearing, but not to withdrawals prior to the hearing. Indeed, in our view, the reference in the regulation to working days has meaning only in the context of counting the days between a withdrawal and the scheduled hearing date. The regulation merely clarifies that an insurer’s withdrawal of an appeal “at or after the hearing” should be treated in the same manner as a withdrawal prior to the hearing: computation based on “working

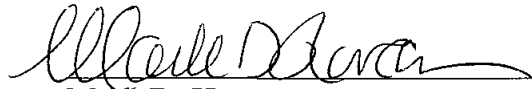
James Brown
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days” applies to *all* insurer appeal withdrawals attendant to scheduled hearings under § 11.

Accordingly, we reverse the denial of the § 13A(5) attorney’s fee, and recommit the case for the judge to determine the appropriate amount of such fee, pursuant to his authority to “increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.”

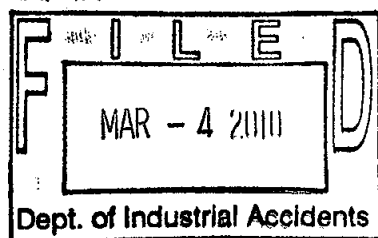
So ordered.


Patricia A. Costigan
Administrative Law Judge


Mark D. Horan
Administrative Law Judge


Bernard W. Fabricant
Administrative Law Judge

Filed:





The Commonwealth of Massachusetts

Department of Industrial Accidents

600 Washington Street, 7th Floor

Boston, Massachusetts 02111

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DEVAL L. PATRICK

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March 4, 2010

BY ELECTRONIC MAIL TRANSMISSION AND FIRST CLASS MAIL

Seth J. Elin, Esquire
Keches Law Group
122 Dean Street
Taunton, MA 02780

selin@kecheslaw.com

Arthur Jackson, Esquire
Commonwealth of Massachusetts
Workers' Comp. Litigation
One Ashburton Place
Boston, MA 02108

arthur.jackson@state.ma.us

RE: Employee:
Employer:
Self-insurer:
Date of Injury:
Board No.:

James Brown
Department of Youth Services
Commonwealth of Massachusetts
September 28, 2005
032922-05

Dear Counsellors:

Enclosed is the decision of the Reviewing Board in the above-captioned case.
The filing date of this decision is **March 4, 2010**.

Your right of appeal from this decision is governed by M. G. L. c. 152, § 12(2), and Rules 3, 4 and 10 of the Massachusetts Rules of Appellate Procedure. Notwithstanding the provisions of § 12(2), the Appeals Court requires that you file your notice of appeal with the Reviewing Board within thirty (30) days of the filing date of the board's decision. Please send your notice of appeal to:

The Commonwealth of Massachusetts
Department of Industrial Accidents
Attention: Fred Capone, Reviewing Board Counsel
600 Washington Street
Boston, MA 02111-1704

RE: James Brown
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Preparation of briefs and records appendices is also governed by the Massachusetts Rules of Appellate Procedure.

Very truly yours,

Patricia A. Costigan
Administrative Law Judge
for the Reviewing Board

PAC/
Enclosure