

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 027425-96

James White
Continental Construction, Inc.
Travelers Property Casualty Corporation

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Carroll and Maze-Rothstein)

APPEARANCES

Paul A. Gargano, Esq., for the employee at hearing
Paul A. Gargano, Esq., and James K. Brownell, Esq., for the employee on brief
Paul V. Mancini, Esq., for the insurer

COSTIGAN, J. The parties cross-appeal from a decision which denied the employee's claim for G. L. c. 152, § 34A, permanent and total incapacity benefits, but awarded § 35 temporary partial incapacity benefits to the employee and a legal fee to his attorney. Finding no merit in the employee's arguments, we affirm the administrative judge's finding that the employee, age thirty-seven at the time of the hearing and a carpenter by trade, was physically and vocationally capable of performing sedentary work within the restrictions identified by the medical experts whose opinions the judge adopted - - the § 11A impartial medical examiner and the insurer's medical expert. However, we reverse the award of a § 13A attorney's fee as the employee did not "prevail" at hearing, as defined by law. See G. L. c. 152, § 13A(5),¹ and 452 Code Mass.

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 pursuant to section eleven; *or* (ii) *the employee prevails at such hearing* the insurer shall pay a fee to the employee's attorney . . . plus necessary expenses.

(Emphasis added.)

Regs. § 1.19(4).²

The judge found that the employee testified in an organized and articulate manner, (Dec. 12), and that his ability to read blueprints, prepare construction cost estimates and supervise others, translated to an earning capacity in the open labor market. Because she credited the employee's testimony that his pain and the medications he took impaired his ability to concentrate, the judge found only a part-time earning capacity of \$135.00 per week. (Dec. 13-14.) She awarded the employee § 35 partial incapacity benefits of \$232.20 per week from and after December 23, 1999. (Dec. 14.)

As her decision reflects a thoughtful and well-reasoned analysis of the employee's testimony against the backdrop of the expert medical and vocational evidence, we are able to determine with reasonable certainty that correct rules of law were applied to facts that were properly found. Lockheart v. Wakefield Eng'g, 16 Mass. Workers' Comp. Rep. 302, 304 (2002), quoting Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993); G. L. c. 152, §§ 11B, 11C. Accordingly, we affirm that aspect of the decision.

We agree with the insurer, however, that the award of an attorney's fee is error, because only the employee appealed from the § 10A conference order, and he did not prevail for the purposes of G. L. c. 152, § 13A(5). "No hearing fee is due when the employee is the only party appealing a conference order, and he gains nothing from that hearing that was not already awarded in the conference order." Paschal v. Lechmere Co., 15 Mass. Workers' Comp. Rep. 313, 317 (2001), citing 452 Code Mass. Regs. § 1.19(4)

² The adjudicatory rule provides:

In any proceeding before the Division of Dispute Resolution, the claimant shall be deemed to have prevailed, for the purposes of M. G. L. c. 152, § 13A, when compensation is ordered or is not discontinued at such proceeding, *except where the claimant has appealed a conference order for which there is no pending appeal from the insurer and the decision of the administrative judge does not direct a payment of weekly or other compensation benefits exceeding that being paid by the insurer prior to such decision.*

(Emphasis added.)

and Green v. Back Bay Restaurant Group, 12 Mass. Workers' Comp. Rep. 470, 471 (1998), aff'd, Green's Case, 52 Mass. App. Ct. 141, 145 (2001).

The parties stipulated that the employee was paid temporary total incapacity benefits under § 34 from July 26, 1996 until December 23, 1999, when those benefits were exhausted. (Dec. 4.) The employee's § 34A claim was denied at a § 10A conference and only he appealed that order. (Dec. 3; Insurer brief 1, 5.) As the hearing decision did not "direct a payment of weekly . . . compensation benefits exceeding that being paid by the insurer prior to such decision,"³ 452 Code Mass. Regs. § 1.19(4), the employee did not prevail and, therefore, was not entitled to an award of an attorney's fee. Accordingly, we reverse that aspect of the decision and vacate the fee award. The decision is otherwise affirmed.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

Filed: June 26, 2003

³ The judge's decision reflects the stipulation of the parties that "the employee is presently receiving Section 35 partial incapacity benefits." (Dec. 4.) Neither the decision nor either party's brief identifies the rate of § 35 benefits. Therefore, as we are permitted to do, see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002), we take judicial notice of the conference order contained in the board file. The employee's § 34A claim was denied, but the judge (a different judge than presided at the hearing) included in the order a statement that "the insurer is reminded of its obligation to continue paying Section 35 benefits at the maximum rate." Thus, it appears that the employee was receiving a weekly § 35 benefit of \$234.90 prior to the hearing decision, which reduced that benefit to \$232.20 retroactive to December 23, 1999.