COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 053255-93 055388-95**

Jeffrey Comeau	Employee
Enterprise Electronics	Employer
Liberty Mutual Insurance Company[1]	Insurer
Massachusetts Insurer's Insolvency Fund[2]	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Koziol, and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Ronald St. Pierre, Esq., for the employee
Margo Sutton, Esq., for Liberty Mutual Insurance Company
William H. Murphy, Esq. for the Massachusetts Insurer's Insolvency Fund at hearing
Paul M. Moretti, Esq. for the Massachusetts Insurer's Insolvency Fund on appeal

HARPIN, J. The employee and the Massachusetts Insurer's Insolvency Fund (MIIF) appeal from a decision awarding the employee § 34A benefits and § 50 interest from April 1, 1996 and continuing. We affirm the decision, with one

[1] The insurer on the employee's December 21, 1993 date of injury was Wausau Insurance, which was subsequently acquired by Liberty Mutual. Liberty is now the insurer of record for that date of injury, and will be referred to as such throughout this decision. (Decision of March 14, 2011, 567; Comeau v. Enterprise Electronics, Inc., 26 Mass. Workers' Comp. Rep. 229, 232 n. 3 [2012].)

[2] The insurer on the employee's October 2, 1995 date of injury was Eastern Casualty Insurance Company, which subsequently became insolvent on June 9, 2010. Comeau, supra. Thus, the Massachusetts Insurer's Insolvency Fund (MIIF), which took over Eastern's obligations pursuant to G. L. c. 175D, § 5, is the insurer for purposes of this appeal. For purposes of clarity, all references to the insurer for the 1995 accident will be to MIIF.

exception: we vacate the date assigned for the inception of the awarded § 50 interest, and award interest from January 25, 2010.

The history in this case is extensive, and is set forth in our prior decision. Comeau, supra. However, we will note salient points here, in order to provide background for our present decision.

On December 21, 1993 the employee[3] sustained a herniated lumbar disc at the L3-4 level while working. (Dec. I, 569.)[4] Liberty accepted liability for the injury and paid the employee § 34 benefits until he returned to work, at which time the insurer paid § 35 benefits until March 10, 1995. (Dec. I, 567.) The employee continued working, in significant back pain, until October 2, 1995, when, while climbing onto a wet running board of a truck, he slipped and fell to the ground. (Dec. I, 570.) He suffered a lumbar disc herniation at the L4-5 level. (Dec. I, 581.) He was taken out of work on December 26, 1995 by his orthopedic treating physician, Dr. David Roth, due to his ongoing back pain. (Dec. I, 570, 581.) The employee has not returned to work since that date. (Dec. I, 581.)

At the time of the second injury MIIF was on the risk. (Dec. I, 567.) An employer's first report was filed in March, 1996, for this injury, with MIIF filing a denial two weeks later, raising liability, disability, § 1(7A), and late notice. (Denial, April 4, 1996.) Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file).

Liberty filed a complaint for recoupment of $34,830.00 in May, 1996, alleging that the employee earned in excess of his average weekly wage while receiving § 35 benefits. The complaint was heard at a conference before a prior

[3] The employee, along with a partner, were the owners and sole employees of the employer.

[4] There were two decisions filed by Judge Bean in this matter. The first, issued on March 14, 2011, will be referred to as "Dec. I." The second, issued on September 26, 2013, will be referred to as "Dec. II."

judge, who denied the request on September 18, 1996. Liberty appealed. (Dec. I, 567.)

The employee then brought a motion to join two claims against Liberty for the 1993 date of injury, one for § 34 benefits from January 2, 1996, and the other for § 36 benefits in the amount of $18,110.08. (Employee's Motion, October 28, 1996.) Liberty brought a motion to join MIIF as the successive insurer for the incident on October 2, 1995. (Dec. I, 567.)

After a conference on the motions, the complaint, and the employee's claims, on December 13, 1996 the judge denied Liberty's request for recoupment, allowed the motions for joinder of MIIF and the employee's claims, and denied those claims, without addressing MIIF's liability. (Dec. I, 567; Denial of Payment, December 17, 1996; Temporary Conference Memorandum, December 12, 1996.) Both the employee and Liberty appealed. (Dec. I, 567.)

Over the next eleven years a number of hearings were scheduled, all of which were rescheduled for reasons unknown. Finally, on July 10, 2008 two § 19 agreements, both of which ended the pending action, were filed and approved by the prior judge.

In 2010 the employee filed claims for benefits against both Liberty and MIIF,[5] seeking § 34 benefits from April 1, 1996 and continuing, or, in the alternative, § 34A or § 35 benefits from the same date. The case was reassigned to a new judge, who heard both claims at a conference on April 28, 2010. Liberty, in addition to denying disability, raised the defense of § 1(7A), and argued that the subsequent insurer, MIIF, was responsible for any benefits from April 1, 1996. MIIF raised liability, § 1(7A), laches, late claim, late notice, and "prejudice." (Temporary Conference Memorandum, April 28, 2010.) The judge ordered Liberty to pay § 34A benefits to the employee beginning on April 8, 2008 and

[5] The employee filed claims in 2008, withdrew them in 2009, refiled them in late 2009, withdrew them again, and finally refiled them on January 25, 2010.

continuing. He denied the claim against MIIF. (Dec. I, 568.) Liberty and the employee appealed.

After a hearing, the judge issued his first decision on March 14, 2011, ordering MIIF to pay the employee § 34A benefits from April 1, 1996 and continuing, and to pay for all medical treatment related to the October 2, 1995 industrial accident. (Dec. I, 583.) He ordered Liberty to pay for medical treatment related to the December 21, 1993 injury that was not related to the October 2, 1995 injury, and to pay a § 8(5) penalty for its late payment of the conference order and for its failure to pay the employee § 34B COLA benefits. He also found Liberty violated § 14(1) by advancing frivolous defenses, and ordered it pay the whole cost of the proceedings. He then ordered the employee to pay Liberty $34,830.00 in recoupment for the overpaid § 35 benefits from 1994 to 1995; allowed Liberty to subtract from that amount the penalties owed the employee; and required MIIF to pay Liberty, out of the retroactive § 34A compensation ordered, any amount of the recoupment not covered by the deduction for the penalties. (Dec. I, 583-585.)

Both the employee and MIIF appealed to the reviewing board. We concluded that the order requiring MIIF to pay to Liberty a portion of the § 34A retroactive compensation as reimbursement for the unrecovered recoupment was contrary to G. L. c. 175D, § 1(2), and we reversed it. Comeau, supra at 235. We rejected MIIF's argument that, pursuant to Chapter 175D, it was exempt from paying benefits under the successive insurer doctrine. Comeau, supra at 236-238. And we vacated the award of benefits against MIIF, due to the judge's misinterpretation of the medical evidence. We ordered a recommittal for findings on MIIF's defenses of § 1(7A), statute of limitations, late claim, late notice, and laches. Comeau, supra at 244.

On recommittal, the judge made findings on the statute of limitations, late notice and late claim defenses, and rejected them. (Dec. II, 372-374.) He reviewed the medical evidence and found that the employee suffered a new

industrial injury on October 2, 1995, implicating MIIF. (Dec. II, 376.) He also rejected MIIF's § 1(7A) defense, finding that the employee's only prior back injury was the December 21, 1993 industrial accident, thus making the section inapplicable. The judge also found, without reference to a medical opinion, that, even if § 1(7A) did apply, the 1995 injury remained a major cause of the employee's disability and need for treatment. (Dec. II, 377.) He then ordered MIIF to pay § 50 interest to the employee on the unpaid benefits ordered, from April 1, 1996 to July 10, 2008, and from January 24, 2010 "until the interest is paid." (Dec. II, 381-382.)

Both the employee and MIIF appealed. However, other than refuting, point by point, MIIF's arguments, the employee did not allege any error in the judge's decision. We therefore find that he has waived his appeal. Meyer v. Wagner, 429 Mass. 410, 411 n.1 (1999).

We now consider MIIF's arguments.

BIAS

MIIF alleges the judge should have recused himself from hearing the case on recommittal "because of partiality, the appearance of partiality, and the outward display of the lack of objectivity occasioned by the vacation of his earlier decision. " (MIIF br. 15.) Specifically, MIIF argues that the judge demonstrated bias at a status conference on April 19, 2013, when he referred to the lack of findings in his first decision on the statute of limitations, late notice, late claim, laches and § 1(7A) as "more of a judicial inaction," and that it was "taken care of. I'll have to do more on 1(7A)." (Tr. I, 39.)[6] MIIF asserts these comments show the judge "already has reached a decision and has declared ("taken care of") that he is not going to change his mind notwithstanding the evidence or the rights of the parties." (MIIF br. 18.) MIIF also asserts the judge "show[ed] his partiality" by referring to the long delay in having the case come to a hearing as judicial

[6] The transcript of the status conference on April 19, 2013 will be referred to as "Tr. I," and that of the hearing on MIIF's bias motion on August 26, 2013 as "Tr. II."

inaction, rather than as "the employee's dilatory prosecution." (MIIF br. 21.) MIIF then notes, as further "evidence," that the judge said the employee's and Liberty's counsel "defended my decision" that § 175D could not be used as a defense by MIIF because it had not raised it at the hearing, even though the reviewing board had specifically directed the judge to allow MIIF to raise the prohibition in that statute barring reimbursement to an insurer. (MIIF br. 21-22; Tr. I, 40.) MIIF alleges: "it very much appears the judge is prejudiced against MIIF because he was embarrassed by MIIF and, as he perceives, the reviewing board. . . . The judge continued that he considered the operation of Chapter 175D as a windfall for MIIF." (MIIF br. 23.) MIIF then asserts the judge "gratuitously engaged in a diatribe" in his second decision. Essentially, MIIF asserts the judge was biased because of "the judge's intolerance for the statutory provisions governing MIIF." (MIIF br. 24.)

Whenever a claim of judicial bias is raised, the judge involved must address that claim and make findings on whether or not he has demonstrated bias towards one or the other party. Johnson v. Boston City Hosp., 14 Mass. Workers' Comp. Rep. 110, 112 (2000). In the final analysis, the decision usually lies within the judge's discretion. Id.; Mulkern v. Mass. Turnpike Auth., 20 Mass. Workers' Comp. Rep. 187, 201 (2006).

The judge conducted a hearing on August 26, 2013, on MIIF's motion for recusal on the basis of bias. He allowed all counsel to present their arguments, and listened without interruption. The judge considered each argument and found he did not demonstrate bias towards MIIF. He noted that by saying "they're taken care of," with reference to MIIF's defenses, he used an "unfortunate choice of language," but he meant only that all the evidence on those issues was contained within the submitted writings, and did not need further evidence. "I should not have said it's taken care of, because really it isn't." (Dec. II, 371; Tr. II, 14-16.) With respect to Chapter 175D, he stated: "[t]he other one that I perhaps I do have some bias but I don't call it that, I don't like 175D." (Tr. II, 16.) "I think there are

some things like 175D I have to recognize and implement, other things I can just renew my prior findings and other things, as directed by the reviewing board, I have to review it." (Tr. II, 18.) Finally, the judge noted, "This is a tough case, it's got a terrible and long and sordid history, it's got a lot of difficult issues and some of them I got wrong. And I say that not with any case of irony or any case of disgust or dismay, it just happens I'm going to have to fix them." (Tr. II, 18.)

Given the judge's findings on each element of the alleged bias, his acceptance of our prior decision, and his expressed interest in "fixing" the issues identified in our decision, we discern no bias, and affirm the judge's ruling denying MIIF's motion.

MIIF'S DEFENSES

MIIF next argues the judge's dismissal of the defenses of statute of limitations, late claim, late notice and laches was arbitrary, capricious and contrary to law. We disagree.

Statute of Limitations

MIIF argues that no claim was filed against its predecessor within the four year period allowed by G. L. c. 152, § 41[7] following the October 2, 1995 injury, and therefore the limitation of action contained within that section operates to bar any action against MIIF. This argument conveniently sidesteps the fact that Liberty filed a motion on October 28, 1996 to join MIIF to the employee's

[7] General Laws c. 152, § 41, states, in relevant part:

> No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and unless any claim for compensation due with respect to such injury is filed within four years from the date the employee first became aware of the causal relationship between his disability and his employment. . . .
>
> The payment of compensation for any injury pursuant to this chapter or the filing of a claim for compensation as provided in this chapter shall toll the statute of limitations for any benefits due pursuant to this chapter for such injury.

pending claim against Liberty, and that motion was allowed by the prior judge on December 13, 1996. (Dec. I, 567; Denial of Payment, December 17, 1996; Temporary Conference Memorandum, December 12, 1996.) Liberty specifically noted the filing of an employer's first report of injury for October 2, 1995, and the fact that MIIF was the workers' compensation insurer of the employer on that date. It concluded by requesting that MIIF be joined as a possible successive insurer. (Motion, October 28, 1996.)

Joinder of a party[8] is covered by 452 Code Mass. Regs. § 1.20.[9] Sub-part (1) of that regulation notes that if the joinder is allowed, the new insurer is joined "as a party."

> Rule 1.20(1) provides that an administrative judge before whom a proceeding is pending may join, or any party to such proceeding may request the administrative judge to join, as a party, on due notice and a right to be heard, an insurer, employer, or other person who may be liable for payment of compensation to the employee, this includes the Trust Fund. This rule will be of particular importance when an employee has worked for a series of employers

[8] It has been held that allowance of joinder is a valid exercise of the department's equity powers. Utica Mut. Ins. Co. v. Liberty Mut. Ins. Co., 19 Mass.App.Ct. 262, 267–268 (1985).

[9] 452 Code Mass. Regs., § 1.20, states, in relevant part:

> (1) An administrative judge before whom a proceeding is pending may join, or any party to such proceeding may request the administrative judge to join, as a party, on written notice and a right to be heard, an insurer, employer, or other person who may be liable for payment of compensation to the claimant.
>
> (2) A party to be joined shall not be allowed to raise a defense of late claim if the original claim was filed timely, but shall be allowed to raise any and all other reasonable defenses which would have been available to him had the claimant filed an original claim against the party to be joined, provided that the party requesting joinder, in the absence of mistake or inadvertence, made a reasonable attempt to ascertain the identity of the correct party or parties before the filing of the original claim.

> who may be liable for compensation, under the successive insurer rule.

Nason, Koziol & Wall, Workers' Compensation, § 16.5 (3d ed. 2003) .

Since the purpose of a "successive insurer" defense is to bring into a pending proceeding an insurer on the risk for an injury that occurred *after* the injury that precipitated the pending claim, Borstel's Case, 307 Mass. 24, 27 (1940)("[C]laims against successive insurers for compensation for a single disability are treated as constituting a single proceeding"), the only question is whether the joinder occurs within the statute of limitations period for the subsequent injury. That is clearly what happened here. The injury occurred on October 2, 1995, with the joinder approved fourteen months later, on December 13, 1996. The joinder acted as the functional equivalent of having a claim filed against MIIF for the October 2, 1995 injury, thus tolling the statute. G. L. c. 152, § 41; 452 Code Mass. Regs. 1.20(1).[10] Once having been tolled, the statute was no longer available to MIIF as a defense.

Section 19 Agreements

MIIF argues further that the § 19 agreement between Liberty and MIIF, by failing to state that MIIF would become a party to any future litigation (that section having been struck from the agreement), ended the case against MIIF. "Therefore, the denial of the claim against [Liberty], and the subsequent withdrawal of the appeal without a corresponding agreement to later proceed against [MIIF], effectively is the end of any viable claim against [MIIF]." (MIIF

[10] Sub-part (1) of §1.20 applies to joinder of all parties, including alleged successive insurers. Sub-part (2) of § 1.20, however, appears to apply only if the matter joined related back to the original date of injury, as it removes the defense of late claim under § 41. When there is a later date of injury, as in the present case, an insurer joined under § 1.20(1) may raise § 41 as a bar, if the joinder occurs after the period of limitations has run.

br., 26.)[11] The resolution of this issue requires an examination of exactly what the two § 19 agreements did, and did not, do.

In the first agreement, between Liberty and the employee, the parties agreed to withdraw their appeals of the December, 1996 conference order, which had denied Liberty's complaint for recoupment; allowed and then denied the employee's § 34 claim; and allowed MIIF's joinder to the pending § 34 claim as a successor insurer.[12] The judge had not issued an order against or in favor of MIIF; thus there was no determination of its liability for the 1995 injury. Heredia v. Simmons Co., 10 Mass. Workers' Comp. Rep. 490, 493(1996)(only the issues actually presented to judge at conference have been determined for purposes of issue preclusion). MIIF was merely joined as a possible successor insurer in 1996. The withdrawal of the appeals by Liberty and the employee in 2008 meant that there was no longer a claim pending against either Liberty or the employee or MIIF.

The second § 19 agreement, between Liberty and MIIF, contained three paragraphs, but the parties agreed on only two of them. The first restated that Liberty would withdraw its appeal of the conference order denying recoupment, without prejudice. The second noted that MIIF would stipulate "without prejudice

[11] MIIF raised this argument in its appeal of the first decision (MIIF 2011 br., 27), but as the judge did not reach MIIF's defenses in that decision, we examine this argument for the first time.

[12]Liberty withdrew its appeal "without prejudice," and the employee noted that he "will have all rights available under M.G.L. Ch. 152, to raise a disability claim." The parties also noted that the employee "stipulate[d] to an overpayment made by [Liberty] Insurance Co. Inc. in the amount of $34,830." Finally, "[i]n consideration of the stipulation, the Insurer agrees to stay any and all action on the overpayment against the Employee until such time the employee files a future claim for disability and that claim resolved." (Dec. I, 567-568.)

and without establishing liability that it has previously been joined to the matter on the theory of a subsequent injury during its coverage period." [13]

The withdrawal of both appeals by means of the § 19 agreements meant that no claims were pending against Liberty, the employee or MIIF. MIIF argues that the withdrawal of the appeals ended the case against it. However, this assertion sidesteps the fact that MIIF was merely joined to the action in 1996 as a possible successor insurer, with no order having been issued by the judge against or in favor of it. There was thus was no determination of its liability for the 1995 injury. The new claim in 2010 brought MIIF back into the case for an adjudication as to its liability for the 1995 injury. Green's Case, 46 Mass.App.Ct. 910, 911(1999)(claim filed years after injury was allowed, as an earlier filed claim tolled statute of limitations.)

Late Notice

MIIF asserts that the employee did not give notice of his injury "as soon as practicable," see G. L. c. 152, § 41, after the October 2, 1995 injury. (MIIF br. 27.) Yet the employer filed a first report of injury on March 20, 1996, to which MIIF filed a denial fourteen days later, raising liability, disability, § 1(7A), and late notice. (First Report, March 20, 1996; Denial, April 4, 1996). The judge specifically found that "the employee testified credibly that he provided immediate notice to his employer." (Dec. II, 372.)[14] Given that findings on credibility are

[13] The third paragraph was struck out by means of slanted lines and a very large handwritten "NO," followed by two exclamation marks. The stricken paragraph stated as follows: "In consideration of withdrawing current litigation activity by both [Liberty] and the Employee, MIIF agree (sic) that at such time any future litigation pertaining to the Employee's claim against [Liberty] for disability commences and upon notice by [Liberty] they will again become a party without prejudice." (Dec I, 568; § 19 agreement, July 10, 2008.) MIIF's lack of agreement to this paragraph had no effect on the present claim. Because the statute of limitations had been tolled by MIIF's joinder, the employee did not need to reserve a right to file a new claim against MIIF.

[14] The judge also found that the employee "filed a claim on April 1, 1996." (Dec. II. 372.) This was incorrect, as the "claim" he referred to was likely the first report filed by

final, Svenson v. Gen. Elec. Co., 27 Workers' Comp. Rep. 177, 180 (2013), the finding that proper notice was given was supported, and we affirm it.

Laches

MIIF also argues that the employee's claim was barred by laches. Laches is applicable to proceedings at the Department of Industrial Accidents. Wadsworth's Case, 78 Mass.App.Ct. 101, 109 (2010), rev. on other grounds, Wadsworth's Case, 461 Mass. 675 (2012). As the Appeals Court noted,

> "Laches is an equitable defense consisting of unreasonable delay in instituting an action which results in some injury or prejudice to the defendant." Yetman v. Cambridge, 1 Mass. App. Ct. 700, 707 (1979). "Laches is not mere delay but delay that works disadvantage to another." Colony of Wellfleet, Inc. v. Harris, 71 Mass. App. Ct. 522, 531 (2008), quoting from Moseley v. Briggs Realty Co., 320 Mass. 278, 283 (1946). "The operation of laches generally is a question of fact for the judge, and a judge's findings as to laches will not be overturned unless clearly erroneous." A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund, 445 Mass. 502, 517 (2005). The burden of proving laches rests with the party claiming laches. McGrath v. CT. Sherer Co., 291 Mass. 35, 59-60 (1935).

Wadsworth, 78 Mass.App.Ct. at 109.

The judge found that, while there had been a long delay in bringing the case to a decided hearing, the "delay was not caused by the actions or inactions of the employee. In fact, the employee was harmed by the delay, which was the result of administrative inaction." (Dec. II, 373.) Despite MIIF's argument that the employee "did not bring a claim against [MIIF] until September 9, 2008," (MIIF br. 29), MIIF was joined to the case on December 13, 1996, and was a full party to all proceedings thereafter, including the § 19 agreement in 2008. The judge found as fact that laches was not operable here, and we will not overturn that finding.

Section 1(7A)

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the employer, dated March 20, 1996. However, his finding of a credible oral notice suffices to preclude MIIF's defense on this issue.

MIIF asserts the judge erred in finding that its § 1(7A) defense failed. However, the judge conducted the appropriate analysis set out in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005), and found that the only prior back injury sustained by the employee before his October 2, 1995 injury was the accepted December 21, 1993 industrial injury, thereby precluding a § 1(7A) defense. (Dec. II, 377; LaFleur v. MCI Shirley, 24 Mass. Workers' Comp. Rep. 301, 305 (2010)(judge's finding that prior injury was compensable will be affirmed if supported by the record evidence). MIIF nevertheless argues that "a November 30, 1995 MRI report showed early degeneration of this [L4-5] disc manifested by early signal loss[,]" (MIIF br. 46), and a December 24, 1993 MRI showed "disc degeneration at L5." (MIIF br. 10.) However, it fails to point to an adopted medical opinion that a pre-existing degenerative condition *combined* with either the 1993 or 1995 injuries to cause or prolong the employee's disability or need for treatment, which is a necessary element of the insurer's burden of production in a § 1(7A) defense.[15] MacDonald's Case, 73 Mass.App.Ct. 657, 660 (2009)(two essential elements of insurer's burden of production are the existence of a pre-existing condition, and the combination of that pre-existing condition with the alleged work injury). The § 1(7A) defense thus failed from the outset.

Interest Award

MIIF argues the judge erred in awarding § 50[16] interest from April 1, 1996, the date he erroneously held was the "filing" date of the employee's claim against

[15] MIIF points to the 2010 report of the impartial physician, Dr. Richard Warnock, as providing an opinion that the employee's disability resulted from a combination of chronic degenerative disc disease and scarring from the epidural abscess. (MIIF br. 47; Ex. 6.) However, the judge did not adopt this opinion.

[16] General Laws c. 152, § 50 states:

> Whenever payments of any kind are not made within sixty days of being claimed by an employee, dependent or other party, and an order or decision requires that such payments be made, interest at the rate of ten percent per annum of all sums

MIIF,[17] to July 10, 2008, and from January 25, 2010, the date the employee actually filed a claim against MIIF, to the date MIIF paid all interest on the awarded retroactive compensation. It concedes that interest awarded from January 25, 2010 on any amount due the employee "in excess of that already paid" would be appropriate. (MIIF br. 48-49.) However, MIIF argues that its joinder was not a claim as contemplated by the statute, and therefore interest cannot be awarded back to the date of joinder, December 13, 1996. We agree with MIIF that the onset date for the accrual of interest was incorrect, although not for the reason it advances.

As we have noted, *infra*, a joinder is the functional equivalent of a claim and operates to toll the statute of limitations. Had the 1996 joinder/claim been adjudicated and an award made against MIIF, interest would have been due on the amount of the ordered payments that remained unpaid at the time of the award. Therrien v. Stop & Shop, 15 Mass. Workers' Comp. Rep. 428, 431 (2001). However, the 1996 joinder/claim was never resolved. The claim that was adjudicated was filed on January 25, 2010. Therefore, pursuant to § 50, it is the date of the receipt of the notice of that claim by the department from which the interest begins to accrue, not the date of the joinder in 1996. We therefore reverse so much of the decision that awards interest back to April 1, 1996, and order instead that interest be paid by MIIF on the amount of benefits that remained unpaid on the date of the decision, the interest to be calculated from January 25, 2010, until the benefits were paid.

> due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment.

[17] The employee concedes that, contrary to the judge's finding, the appropriate start date for the interest would be the date of the approval of Liberty's motion to join MIIF, December 13, 1996, rather than the April 1, 1996 date chosen by the judge. (EE br., 29.) Given our finding, this concession is irrelevant.

We have considered the remainder of MIIF's arguments and find them to be without merit. We therefore affirm the judge's decision, with the exception already noted on the date for the accrual of interest. Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,618.19.

So ordered.

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William C. Harpin
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **November 6, 2015**