

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 024470-05

Joel Edwards
James N. Ellis, Esquire
Buxton Acquisition Co., LLC
American Home Assurance

Employee
Third Party Claimant
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

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 appeal
Laurie K. Stewart, Esq., for the insurer at hearing and on appeal
John F. Burke, Esq., for the insurer on appeal

KOZIOL, J. The third party claimant appeals from the judge's decision denying his claim for a § 13A(5) attorney's fee. The insurer argues that its offer to accept the employee's underlying claim was not within the five day period prior to the scheduled hearing date, and thus, no fee is due.¹ Following our recent decision in Poulton v. D.R. Billings, Inc., 24 Mass. Workers' Comp. Rep. __ (2010), we reverse the decision and recommit the case for further findings.

The parties stipulated to the facts that form the basis for this fee dispute. (Dec. 2.) The employee's appeal from the judge's § 10A conference order denying his claim for specific medical treatment brought the claim to an evidentiary hearing which was scheduled to take place on April 28, 2008. (Dec.

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 or withdraws its own complaint 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. . . .

2.) On April 22, 2008, the insurer made a written offer to pay the benefits claimed. (Dec. 2.) The period between April 22, 2008 and April 28, 2008 included a weekend. (Dec. 3.) The employee accepted the insurer's offer and no hearing took place. Thereafter, the third party claimant filed the present claim seeking payment of an attorney's fee pursuant to § 13A(5). (Dec. 2.)

In finding the insurer offered to pay the employee's claim more than five days before the scheduled hearing, the judge counted all calendar days between the 22nd and the 28th, including the Saturday and Sunday. (Dec. 3-4.) In Poulton, supra, we concluded the five day statutory period appearing in § 13A(5) "should refer to working days rather than calendar days." Id. Thus, the judge erred by including the weekend in the computation of the five day period necessary for avoidance of payment of an attorney's fee under § 13A(5).

Accordingly, we reverse the decision and recommit the case for further findings addressing the proper amount of the § 13A(5) fee due employee's counsel.²

So ordered.



Filed:

Catherine Watson Koziol
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

² On April 28, 2008, the date of the scheduled hearing, the standard hearing fee pursuant to § 13A(5) was \$5,103.04. See, D.I.A. Circular Letter 323, issued October 5, 2007 and in effect on April 28, 2008; General Laws c. 152, § 13A(10)(providing for the yearly adjustment of attorney's fees payable under § 13A(1)-(6) on October first of each year).

General Laws, c. 152, § 13A(5), 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."