COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 045717-04

Judith Serafino	Employee
The Republican Company	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, Costigan and Koziol)

The case was heard by Administrative Judge Chivers.

APPEARANCES

John F. Trefethen, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Robert L. Noa, Esq., for the employee at oral argument
Paticia M. Vachereau, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision in which § 36 loss of function benefits were awarded for a left wrist injury without an order for payment of an attorney's fee pursuant to § 13A(5). While we summarily affirm the decision as to the challenged amount of the § 36 award, we also agree with the employee that a fee is due.

The parties both appealed from the conference order for § 36 benefits. The fee dispute stems from the continuance of a hearing originally scheduled for September 12, 2007. There is no dispute that both parties were before the judge on that day, and that all agreed the matter should be continued. February 14, 2008 was the date set for the continued hearing. The insurer withdrew its appeal of the conference order on January 28, 2008.

The employee argues that he and his attorney were present and prepared to go forward with the hearing on September 12, 2007, and that even if the insurer had withdrawn its appeal that day, payment of a fee would still be required pursuant to § 13A(5). We agree that the statute is clear on this issue. "Whenever an insurer files a complaint or contests a claim for benefits and . . . accepts the employee's claim or withdraws its own complaint within five days of the date set for

a hearing," the fee is due. Moreover, 452 Code Mass. Regs. § 1.19(5) addresses the very scenario presented here:

> For purposes of M. G. L. c. 152, § 13A(5), withdrawal by an insurer at or *after the hearing* shall constitute withdrawal within five working days of the date set for hearing pursuant to M. G. L. c. 152, § 11. . .

(Emphasis added.)

The insurer argues that no fee is due because no hearing could take place on the original September 12, 2007 hearing date. The insurer asserts that on June 13, 2007, it requested that the impartial doctor address three, as yet unanswered, hypothetical questions included in its original conference package. As of September 12, 2007, there had been no response from the doctor. However, nothing in the record indicates the insurer had followed up on that request, nor is there any indication there was any agreement between the parties, *at least five days prior to September 12, 2007*, regarding this matter. To the contrary, employee's counsel avers he arrived on September 12, 2007 prepared for a hearing. The employee is correct in his assertion that "[t]he 'five day' rule would serve little purpose if it did not provide for the reimbursement to an employee's attorney who invests the effort and time required to competently and zealously present the clients claim at hearing." Darling v. RCB Marion Manor, 9 Mass. Workers' Comp. Rep. 313, 315 (1995).[1]

Finally, the insurer argues that the employee's cross-appeal of the conference order meant he had to prepare for the hearing regardless of the status of the insurer's appeal. However, as § 13A(5) makes no exception for this procedural circumstance,[2] this argument is not persuasive.

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[1] Although Darling, supra addressed the so-called, and now-discontinued, "medical hearings" following the lay hearing, this quote remains a viable statement of the policy behind the "five day" rule.

[2] This is, perhaps, due to the fact that an employee who is required to defend against an insurer's appeal has more at stake than one who simply seeks benefits in excess of those awarded in the conference order. See Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996)("Had the administrative judge, responding to the [insurer's] appeal, in any way reduced the temporary disability payments awarded by the conference order, the employee would have been exposed to a recoupment claim by the [insurer] for the recovery of overpayments pursuant to § 11D(3)").

Accordingly, the employee is entitled to a § 13A(5) fee in the amount of $5,103.04. The decision is affirmed in all other respects.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: ***December 7, 2009***