

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 028747-94

Linda Pizzano
Hale & Dorr
Wausau Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Carroll, Levine and Maze-Rothstein)

APPEARANCES

Brian C. Cloherty, Esq., for the employee
Daniel Napolitano, Esq., for the insurer

CARROLL, J. The employee appeals from a decision that discontinued benefits as of the date of the impartial examination, but did not award counsel fees to the employee's attorney. The employee contends that she prevailed for the purposes of G.L. c. 152, § 13A(5), and, therefore, the law requires the insurer to pay her attorney's fees. Consistent with our decisions in Conroy v. Norwood Hosp., 11 Mass. Workers' Comp. Rep. 487 (1997) (Conroy I), and Conroy v. Norwood Hosp., 14 Mass. Workers' Comp. Rep. ____ (May 23, 2000) (Conroy II), we award a hearing fee.

The employee suffered a work-related injury on July 13, 1994. Following a full evidentiary hearing, the insurer was ordered to pay § 34 temporary total incapacity benefits from July 14, 1994 to April 20, 1995 and ongoing § 35 partial incapacity benefits thereafter. (Dec. 2.) Subsequently the insurer filed the present complaint to discontinue the employee's weekly benefits. After a § 10 conference, the judge declined to authorize the insurer to modify or discontinue benefits. (Conference order filed October 21, 1997.) The insurer appealed to a hearing de novo where it disputed the extent, if any, of the employee's incapacity, denied entitlement to ongoing medical benefits and sought recoupment under § 11D(3) from April 23, 1997, the date the insurer filed its complaint. (Dec. 2.)

Pursuant to § 11A, Dr. Mark Berenson conducted an impartial medical examination of the employee on January 22, 1998. Dr. Berenson was unable to discern any objective findings, opining that the employee's strain had resolved as of the date of his examination and that the employee could return to work on a full-time basis without restriction. (Dec. 5-6.) The administrative judge adopted the opinions of Dr. Berenson and found that, as of January 22, 1998, the employee was no longer incapacitated as a result of her industrial accident. The judge allowed the employee to retain some of the compensation ordered at conference (i.e., § 35 partial incapacity benefits from April 23, 1997, the date of the filing of the insurer's complaint, to January 22, 1998, the date of the impartial exam) before allowing the insurer's complaint to discontinue benefits as of January 22, 1998 and found the insurer entitled to recoup any payments of weekly benefits made after that date.

After the decision was issued, the employee filed a motion for an attorney's fee, contending that because the judge did not adopt the insurer's request to terminate benefits prior to the date of the impartial examination, she had prevailed. (Motion filed October 7, 1998.) The judge denied the motion. (Denial initialed on Motion, October 13, 1998.)

The employee appeals, arguing that her attorney is entitled to a fee. The insurer, predictably, argues no fee is due. The conclusion in Conroy I, *supra*, controls the outcome of this appeal. There, the judge denied the insurer's request to discontinue the employee's benefits at conference, but ordered it in the hearing decision – like the present case – as of the date of the impartial examination. We stated: “[W]hen an insurer seeks to discontinue, the disputed period begins no earlier than the filing date of the complaint, as said filing signifies its resistance to each ensuing payment.” *Id.* at 488. The insurer, however, may define the disputed period in any way it sees fit, and the employee has the burden of proving entitlement to compensation throughout that disputed period. *Id.* at 489. If an employee retains any of the compensation ordered at the conference in the face of an insurer's appeal, she is entitled to a fee, because those benefits were in jeopardy so long as the insurer continued to contest entitlement. *Id.* at 489-490. See Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996). In Conroy I, we recommitted the case

because the findings were deficient: Because the time frame in dispute was not set out in the record, and the judge had made no specific findings regarding that issue, we were unable to determine whether the employee actually retained any benefits in the disputed period. Id. at 488-489.

There is no such problem in the present case. The insurer explicitly put the maximum possible time frame into dispute— from the date of its filing for discontinuance – by seeking recoupment for any benefits paid past that date. (Dec. 2.) The judge’s findings are clear that he found the employee remained incapacitated until the date of the impartial examination. (Dec. 5.) While the judge terminated benefits on the date of the impartial examination – just as in Conroy – the employee here prevailed under § 13A(5) by retaining the *disputed* benefits paid from the filing date of the insurer’s complaint until the termination.

Accordingly, we award the employee a hearing fee of \$4,110.30¹ under § 13A, reversing the judge’s denial of same.

So ordered.

Martine Carroll
Administrative Law Judge

¹ St. 1991, c. 398, § 103, provides that subsections (1) through (9) and (11) of § 13A of G.L. c. 152 “shall apply to all services performed after the effective date of this Act.”

On the other hand, § 106 of the aforesaid St. 1991 c. 398, provides that subsection (10) of the aforesaid § 13A shall be deemed to be substantive in character.

Therefore, when injuries occurred prior to December 23, 1991, but legal services are performed thereafter, attorneys’ fees are limited to the amount in § 13A(5), that is \$3,500.00. On the other hand, adjustments under subsection (10) of § 13A do apply to injuries occurring after December 23, 1991.

Hopkins v. Digital Equipment Corp., 13 Mass. Workers’ Comp. Rep. 295, 296 n.2. (1999).

Therefore, since this is a 1994 injury, an adjustment under § 13A (10) is made and the attorney’s fee is \$4,110.30.

Linda Pizzano
Board No. 028747-94

Frederick E. Levine
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

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MC/jdm