COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 006442-04**

Lorenza Badea	Employee
Hasbro, Inc.	Employer
Hasbro, Inc.	Self-Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

APPEARANCES

Michael D. Facchini, Esq., for the employee
Frederica H. McCarthy, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding an attorney's fee pursuant to G. L. c. 152, § 13A(5). It contends no fee was due because the employee's appeal of the conference order resulted in a reduction of her § 35 weekly incapacity benefits and, therefore, she did not "prevail" within the meaning of the statute. [1] The employee counters that she prevailed by retaining some benefits in the face of the self-insurer's allegation at hearing that an intervening accident severed the causal connection between

[1] General Laws c. 152, § 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 in an amount equal to three thousand five hundred dollars plus necessary expenses.

As of the February 8, 2007 filing date of the hearing decision, the statutory fee in effect was $4,925.03.

the work injury and her incapacity. We agree with the employee and affirm the fee award.

The facts pertinent to the issue on appeal are simple. The self-insurer accepted liability for the employee's March 9, 2004 industrial back injury. As a result of the September 15, 2005 discontinuance conference, the employee was placed on ongoing § 35 partial incapacity benefits at the maximum weekly rate of $212.66 based on her average weekly wage of $472.57. Both the employee and the self-insurer appealed the conference order. However, the self-insurer withdrew its appeal on or about October 7, 2005. Accordingly, the case went to hearing on June 28, 2006 solely on the employee's claim for § 34 temporary total incapacity benefits. (Dec. 1-2; Self-ins. br. 1.)

At hearing the self-insurer challenged the employee's claim for benefits on the basis of extent of disability and causal relationship. (Dec. 2.) The self-insurer clarified its causal relationship defense at the commencement of the hearing:

> THE JUDGE: You've also listed causal relationship.
>
> MS. McCARTHY [for the self-insurer]: No, Your Honor, because there was an intervening motor vehicle accident. So as of that date [October 30, 2005] --
>
> THE JUDGE: All right. . . .

(Tr. 5.) There is no dispute that the self-insurer was requiring the employee to prove entitlement to compensation benefits on and after October 30, 2005. [2]

[2] Had the employee also withdrawn her appeal, and the self-insurer wished to challenge the employee's receipt of benefits as of the October 30, 2005 motor vehicle accident, it would be required to file a complaint to terminate benefits based on that accident. That complaint, under ordinary circumstances, would proceed from conciliation to a § 10A conference. Had the employee withdrawn her appeal at the hearing, the self-insurer (having withdrawn its appeal) would have been precluded from challenging the employee's entitlement to weekly benefits for the period covered by the conference order up until the date of the hearing. See G. L. c. 152, § 10A(3), which provides, in pertinent part:

The judge took note of, but chose not to terminate benefits based on, the employee's "serious motor vehicle accident in October of 2005." (Dec. 6.) Rather, the judge found the evidence insufficient to support an award of § 34 total incapacity benefits, and reduced the employee's ongoing § 35 partial incapacity benefits by increasing her weekly earning capacity to $150.00 in two steps. As noted above, (see footnote 1), the judge awarded employee's counsel a fee in the amount of $4,925.03 under the provisions of § 13A(5). (Dec. 6-7.)

The self-insurer argues against the attorney's fee award, because it withdrew its appeal the conference order, and because the employee's benefits were reduced by the hearing decision. [3] Day v. Thomas Gallagher Co., 19 Mass. Workers' Comp. Rep. 160 (2005). Ordinarily, the self-insurer would be correct; however, this case is not so simple.

The record is clear the self-insurer affirmatively sought to terminate the employee's benefits as of the October 30, 2005 motor vehicle accident. (Tr. 5, 48-53.) In so doing the self-insurer was, as a practical matter, joining a complaint to discontinue the employee's entitlement to all weekly benefits after the withdrawal of its appeal. (Tr. 4-5.) See Casagrande v. Massachusetts Gen. Hosp., 12 Mass. Workers' Comp. Rep. 137, 140 n.2 (1998)(approving practice of joining claim for § 34A benefits to insurer's complaint to discontinue, where employee had no pending claim to amend under 452 Code Mass. Regs. § 1.23). The self-insurer's allegation that the intervening accident severed the causal relationship between the employee's accepted industrial accident and her alleged

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> Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order. . . .

[3] 452 Code Mass. Regs. § 1.19(4), 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[.]

incapacity placed in jeopardy the employee's entire benefit entitlement from October 30, 2005 onward. See Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996). In such circumstances, we think that "the employee falls within the typical 'prevailing party' formulation of one who succeeds on any significant litigation issue, achieving 'some of the benefit' sought in the controversy." Connolly, supra at 38, quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978). Under the plain terms of 452 C.M.R. § 1.19(4), no fee would be due had the self-insurer simply called upon the employee to meet the burden of proving her claim for § 34 benefits. Ginley's Case, 244 Mass. 346, 348 (1923)("[I]f not conceded by the insurer, evidence must be introduced which satisfies the statutory requirements and warrants an award.") However, by interjecting a new theory into the case -- that of intervening cause -- the self-insurer placed a new issue in dispute. (Tr. 5, 48-53.) Because the employee prevailed by fending off the self-insurer's de facto complaint to terminate her weekly benefits as of October 30, 2005, a § 13A(5) fee was properly awarded. See Richards's Case, 62 Mass. App. Ct. 701 (2004)(§ 13A(5) fee due for employee's successful defense against insurer's complaint for § 14 fraud).

The decision is affirmed. Because the employee has prevailed in her appeal to this board, the self-insurer shall pay employee's counsel an attorney's fee pursuant to §13A(6) [4] in the amount of $1,458.01.

So ordered.

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Mark D. Horan
Administrative Law Judge

[4] General Laws c. 152, § 13A(6) provides:

> Whenever an insurer appeals a decision of an administrative judge and the employee prevails in the decision of the reviewing board, the insurer shall pay a fee to the employee's attorney in the amount of one thousand dollars, plus necessary expenses. An administrative [law] judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: May 6, 2008