COMMONWEALTH OF MASSACHUSETTS

Department of Industrial Accidents	**BOARD NO. 009714-93**
Mary Conroy	Employee
Norwood Hospital	Employer
Norwood Hospital	Self-Insurer

REVIEWING BOARD DECISION

(Judges Carroll, Maze-Rothstein and Levine)

APPEARANCES

Michael J. Powell, Jr., Esq., for the employee
William H. Murphy, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on brief

CARROLL, J. The self-insurer appeals from a decision after recommittal in which an administrative judge reiterated his award of a § 13A(5)[1] attorney's fee for the employee's prevailing at a prior hearing. The judge had terminated the employee's weekly benefits as a result of that hearing. However, the termination of benefits was effective only as of the date of the impartial medical examination, leaving intact those benefits that had been paid during the period in dispute from the self-insurer's filing of its complaint for modification or termination, until the § 11A medical examination. See Cubellis v. Mozzarella House, 9 Mass. Workers' Comp. Rep. 354, 356 (1995)(judge may

[1] General Laws c. 152, § 13A(5), as amended by St. 1991, c. 398, § 35, reads:

> 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. An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.

terminate weekly benefits as early as the filing of the insurer's complaint for such relief, but no earlier). Addressing the self-insurer's earlier appeal from that initial award of an attorney's fee, the reviewing board analyzed the issue in terms of the self-insurer's potential right to recoup benefits paid pursuant to a § 10A conference order under § 11D(3)[2]:

> [C]onference and hearing proceedings are "separate and distinct." Karamanos v. J.K. Luncheonette, 5 Mass. Workers' Comp. Rep. 405, 407 (1991). The hearing is *de novo* "where issues are raised anew." Id.
>
> With the lines of demarcation between the informal conference and the *de novo* evidentiary hearing clearly drawn, a long line of cases have since held that findings commencing, modifying or terminating benefits in hearing decisions must be "anchored in the evidence." [Citations omitted.] Thus, it is not only the conference-based temporary order of payment, but also the positions taken by the parties at the *de novo* hearing itself, which require the disputed period [of incapacity] to be delineated. What an employee stands to win or lose [by way of a claim for recoupment] in the hearing is the touchstone of whether the employee has "prevailed" for the purposes of a fee award under § 13A . . . .
>
> A partial success by the employee at hearing will support an award of a counsel fee. See Connolly's Case, [41 Mass. App. Ct. 35, 37 (1996).]
>
> . . .
>
> [W]e hold that if an employee retains any of the compensation ordered [at the conference proceeding], she is entitled to a fee.
>
> Unfortunately, the decision does not identify what the period in dispute was and whether the employee actually retained any benefits that were disputed. As such, we cannot determine whether the legal requirements of § 13A(6)[sic] have been met.

[2] General Laws c. 152, § 11D(3), as inserted by St. 1991, c. 398, § 32, reads:

> An insurer that has paid compensation pursuant to a conference order, shall, upon receipt of a decision of an administrative judge or a court of the commonwealth which indicates that overpayments have been made be entitled to recover such overpayments by unilateral reduction of weekly benefits, by no more than thirty percent per week, of any remaining compensation owed the employee. Where overpayments have been made that cannot be recovered in this manner, recoupment may be ordered pursuant to the filing of a complaint pursuant to section ten or by bringing an action against the employee in superior court.

> We, therefore, deem it appropriate to recommit this case for further findings consistent herewith.

Conroy v. Norwood Hospital, 11 Mass. Workers' Comp. Rep. 487, 490-491 (1997).

> The judge, after recommittal, found as follows:
>
> On December 12, 1994, the insurer filed a complaint to modify or terminate compensation.
>
> At time of hearing, the insurer's issue sheet did not specify the specific period in dispute.
>
> The hearing transcript is silent as to the specific dates of the period in dispute.
>
> I find, therefore, that the earliest date in the period in dispute was December 12, 1994, the date the insurer filed its complaint. Based on the opinion of the impartial physician, which I adopt, there was no disability causally related to the industrial injury as of May 25, 1995, the date of his examination. The period in dispute, therefore, is December 12, 1994, through May 25, 1995.
>
> . . .
>
> I find [the employee] retained her entitlement to compensation for the period in dispute . . . .

(Dec. 3-4, 6.) The judge therefore reiterated his award of § 13A(5) attorney's fees. (Dec.6.)

In its present appeal, the self-insurer contends that the judge erred by awarding an attorney's fee based on the following argument. The self-insurer contends that its forbearance to move for additional medical evidence to address the disputed period of incapacity prior to the impartial examination, along with its opposition to the employee's motion to that effect, stands as a waiver of that disputed period, as a matter of law. The judge was not persuaded by this argument. (Dec. 4.) Nor are we.

The § 11A examination date does not always represent the earliest date that could support a finding of modification or termination of benefits. A judge may be warranted in finding that the § 11A impartial medical opinion, although stated as of the exam date

may, when read in conjunction with other evidence in the record, support a finding that incapacity came to an end prior to the date of the impartial exam. See e.g., Hernandez v. Crest Hood Foam Co., 13 Mass. Workers' Comp. Rep. 445 (1999) (impartial report finding of no medical disability "could be rationally read to cover the entire period of claimed incapacity"). Also see Miller v. Metropolitan District Comm'n., 11 Mass. Workers' Comp. Rep. 355, 357 n.3 (1997), for an example of when a judge might be warranted in making an incapacity finding for a period prior to the impartial exam, despite the impartial physician not expressing an opinion as to that period.[3]

Accordingly, we affirm the decision; because it ordered the payment of compensation, the employee prevailed and was entitled to an attorney's fee under § 13A(5). See Connolly's Case, 41 Mass. App. Ct. 35, 36-38 (1996); Gonzalez's Case, 41 Mass. App. Ct. 39, 42 (1996)(order of compensation necessary to support award of § 13A(5) fee). The recent rescript decision in Mueller's Case, 48 Mass. App. Ct. 910 (1999), in which the Appeals Court denied a § 13A(5) fee for an employee's partial success in defending against an insurer's recoupment claim, is not to the contrary. The judge ordered no compensation in that case.

The decision is affirmed.

So ordered.

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Martine Carroll
Administrative Law Judge

[3] If, as the appellant urges, an insurer's failure to move for additional medical evidence were, as a matter of law, always to be interpreted by a judge as a waiver of a possibly disputed period, then insurers might file motions just to preserve the period prior to the impartial medical examination, as opposed to lodging said motion, with sound grounding, in questions of inadequacy or complexity as required by the statute. See G.L. c. 152, §11A. The better practice is for the insurer, in the first instance, to indicate what period it disputes. This was not done here.

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Susan Maze-Rothstein
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: May 23, 2000
MC/jdm