COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 029985-07 003410-14 003411-14**
Mary Wambugu	Employee
Radius Healthcare Center at Millbury	Employer
Atlantic Charter Insurance Company	Insurer
Christopher House	Employee
AIM Mutual Insurance Company	Insurer
Senior Comfort Service	Employee
National Union Fire Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Long)

This case was heard by Administrative Judge Benoit.

APPEARANCES
John A. Smillie, Esq., for the employee
Anne G. Clark, Esq., for Atlantic Charter Ins. Co.
Robert J. Riccio, Esq., for AIM Mutual Ins. Co. at hearing
Holly B. Anderson, Esq., for AIM Mutual Ins. Co. on appeal
Joseph F. Culgin, Esq., for National Union Fire Ins.

CALLIOTTE, J. This is the second appeal to the Reviewing Board in a successive insurer case involving injuries to the employee's left and right shoulders. The employee and the first insurer, Atlantic Charter (Atlantic), appeal from the judge's recommittal decision finding the employee was not entitled to §§ 13, 30 or 34A benefits from the second insurer, AIM, for an injury to her right shoulder suffered at her subsequent employment with AIM's insured, Christopher House. For the following reasons, we vacate the decision and transfer the case to the senior judge for a hearing de novo before a different administrative judge.

The extensive procedural and factual history of the case has been thoroughly set forth in Wambugu v. Radius Healthcare Center at Millbury et al., 31 Mass. Workers' Comp. Rep. 49 (2017). In his first decision, the judge found that Atlantic, the first insurer, was responsible for medical treatment for the employee's 2007 left and right shoulder injuries. Id. at 52-53. In Wambugu, supra, we held that the impartial medical opinion of Dr. Charles Kenny, which was the only medical opinion adopted by the judge, established, *as a matter of law*, that the employee had suffered a medical worsening of, and injury to, her right shoulder during her subsequent employment, from May 2008 until January 2011, at Christopher House, which was insured by AIM. Id. at 57-58. We reversed "so much of the decision as found that Atlantic Charter is responsible for payment of the employee's medical treatment for her right shoulder on the ground that there was no injury at Christopher House." Id. at 59. We recommitted the case for the limited purpose of allowing the judge to make further findings of fact and rulings of law on the remainder of the employee's claim, which included disability and extent thereof, and medical treatment of the right shoulder, id. and n.7, as well as specific issues he had not decided. Those issues were AIM's defenses of "proper notice; proper claim; laches; Section 1(1) average weekly wage; double recovery; and Section 48." Id. at 58-59 and n. 6.

Instead of deciding only those enumerated issues, the judge's recommittal decision went beyond the scope of the recommittal order in various ways which we discuss in detail, infra. We begin however, by addressing the portion of the judge's recommittal decision which purports to follow our instructions to make findings of fact regarding an issue he left unaddressed in the first decision, i.e., AIM's affirmative defense of late notice.

The judge found the employee did not report an injury to her subsequent employer (Christopher House), during the time she worked there, but first gave notice of the right shoulder injury when she filed her claim against AIM in February 2014. He then found she failed to meet her burden of proving lack of prejudice to AIM resulting from this three-year delay. (Dec. II, 21-22.) He also found no evidence that the claim was

improper.[1] On recommittal, he denied the §§ 13, 30 and 34A right shoulder claims against AIM and National Union.[2] (Dec. II, 20.)

The employee argues that the judge made inaccurate findings on the threshold issue of whether AIM or Christopher House was given timely notice of the right shoulder injury. (Employee br. 4-5.) We agree. In order to maintain her claim against AIM, the employee must prove that notice of the injury to her right shoulder was,

> "given to the insurer or employer 'as soon as practicable after the happening thereof.' G.L. c. 152, § 41. Such notice is to be in writing and state the time, place and cause of the injury. G.L. c. 152, § 42. However, '[w]ant of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by such want of notice.' G.L. c. 152, § 44. The employee has the burden of proving notice or lack of prejudice to the insurer. Thibeault's Case, 341 Mass. 647, 649 (1961); Brunetti v. Avon Prods., Inc., 8 Mass. Workers' Comp. Rep. 71, 72 (1994). Either knowledge by the employer or lack of prejudice will excuse failure to give proper notice. See Swasey's Case, 8 Mass. App. Ct. 489, 495 (1979)."

Mason v. Action, Inc., 26 Mass. Workers' Comp. Rep. 221, 224 (2012), quoting Dugas v. Bristol County Sheriff's Dep't, 17 Mass. Workers' Comp. Rep. 349, 353-354 (2003)(footnote omitted). The judge found,

> The employee made no report of injury to the Employer [Christopher House] during her period of employment. The employee last worked for Christopher House in January 2011. The employee filed her claim for benefits arising from a right shoulder injury in February 2014. The essence of the grounds of Proper Notice and Laches lies in the notion that the insurer has been prejudiced by the Employee's inaction concerning a right shoulder injury for more than three years.

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[1]The judge further found the employee failed to meet her burden of proof as to average weekly wage because the parties had failed to stipulate regarding that issue, or to submit evidence of wages. The judge made no determination on the issues of double recovery or § 48, because AIM, though raising them, had failed to make any argument on those issues. (Dec. II, 22-23.) Because the case is being reassigned to a new judge for a hearing de novo, we do not address those issues.

[2] None of the parties allege error in the judge's findings regarding National Union, which insured another subsequent employer, Senior Comfort Services. Accordingly, we omit most mention of National Union and Senior Comfort Services from our discussion of this case.

(Dec. II, 20-21; footnote omitted; emphasis in original; see also id. at 16.) The judge simply listed ways in which lack of notice and late claim[3] may prejudice an insurer, without any analysis of the case before him. He then summarily found the employee had "failed to meet her burden of proving lack of prejudice to AIM . . . resulting from a 3-year delay between the conclusion of her employment and the first notice that she had injured her right shoulder." (Dec. II, 22.)

The evidence does not support the judge's finding that the first notice to Christopher House or AIM of an alleged compensable injury to the employee's right shoulder was the date she filed her claim in February 2014. The judge noted that, during the pendency of the first claim against Atlantic, the employee and Atlantic had filed a joint motion in April 2012 to join claims against AIM and National Union for benefits arising from an injury to the employee's *left* shoulder, but that there was no mention of a *right* shoulder injury. (Dec. II, 21, n.5; Ex. 17, Joint Motion to Join Insurers on Claim for Left Shoulder Injury, Denied April 24, 2012.) However, the joint motion did refer to the claim for benefits resulting from the employee's *right* shoulder impingement syndrome which had been joined to the proceedings against Atlantic in February 2012. (Dec. II, Ex. 17.) More significantly, during the April 12, 2012, motion session, at which attorneys for AIM[4] and National Union were present, the parties clearly discussed a claim for overuse or aggravation of the right shoulder while the employee was working for

[3] The judge found no "impropriety regarding the claim." (Dec. II, 23.)

[4] The caption on the transcript of the April 12, 2012, motion hearing lists Mass. State Employers Insurance Company (MEIC) as the insurer for Christopher House. We take judicial notice of the fact that MEIC is a wholly owned subsidiary of AIM and that the attorneys representing MEIC and AIM are from the same law firm. Moreover, AIM does not argue that it had no knowledge of the right shoulder claim because MEIC rather than AIM was the party at the motion session, but maintains only that the motion hearing establishes that the employee "allegedly sustained, in 2007, an industrial injury to her right shoulder at Radius Health Care Center under Atlantic Charter's coverage and also a 2007 left shoulder injury that allegedly worsened afterward." (AIM br. 28.) As the transcript of that motion hearing reveals, that statement is incorrect. See infra note 5.

Christopher House.[5] Thus, by virtue of notice to their attorneys, AIM and/or Christopher House had notice that the employee alleged she had suffered a cumulative injury to her right shoulder while working at Christopher House, at least as of the date of the motion hearing, April 12, 2012, almost two years before the date the judge found such notice was given.[6]

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[5] The employee's attorney stated:

> Based upon my discussions with my client, it appears that the right shoulder, if not the left, degraded in function and became worse during the course of her two employments – her subsequent employments with the respective insurers, represented by Attorneys Harney [representing MEIC] and Ingraham, and it would seem there was evidence of a worsening, at least for the left shoulder, with both subsequent employers, and perhaps more with the second of the two, which I think is Attorney Harney's client with respect to the last shoulder, which is the right.

(April 12, 2012 Tr. of Motion to Join, 5.)

Atlantic Charter's Attorney argued:

> The employee saw the impartial examiner on September 24, '11, and at that time the treatment had really stopped on the left. And November 3, 2011, is when she started treating on the right. It would be the position of the insurer that, due to a gap in treatment of three years and eight months, from any mention of the right shoulder, and that whole period when she worked for two subsequent employers, that there would be a potential claim for over use. Maybe the right is related to a new aggravation or over use while working for two subsequent employers. So I would ask that you join them to this claim.

Id. at 8-9.

AIM/MEIC's attorney responded,

> She had ample opportunities to complain of any industrial injuries or aggravations to her left shoulder, or I guess now they're saying also her right shoulder; no indication of that either.

Id. at 13.

The attorney for National Union stated,

> The motion to join addresses, to some degree, the right shoulder as well as the left shoulder.

Id. at 17.

[6] Atlantic Charter filed an earlier motion to join the two subsequent insurers, on June 30, 2011, which the judge denied on October 4, 2011. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of board file). In the April 12, 2012, motion session, the judge stated that he held a hearing on that motion in October 2011, at which MEIC was represented by the same attorney as at the later motion session. (April 12, 2012 Tr. of

The judge also erred by failing to determine whether the employer had knowledge of the injury, a required step in the notice analysis. See Giaccarini v. United Parcel Service, 33 Mass. Workers' Comp. Rep. ___ (8/7/19). "Knowledge" has been interpreted to mean that the insurer or employer "knew or had reason to know the injury was causally related to the employment." Hamel v. Kidde Fenwal, Inc., 21 Mass. Workers' Comp. Rep. 127, 131 (2007), citing Kangas's Case, 282 Mass. 155 (1933).

Instead of addressing the question of knowledge, the judge turned his attention directly to the issue of prejudice, finding the employee failed to prove the insurer was not prejudiced by the lack of notice. This finding is also flawed because the judge erroneously found prejudice resulted from a "*3-year delay* between the conclusion of her employment and the first notice she had injured her right shoulder." (Dec. II, 22; emphasis added.) In addition, he failed to analyze how the insurer has been prejudiced in this case, instead merely reciting some factors to be considered. See Thibeault's Case, 341 Mass. 647, 652 (1961) (judge must make adequate subsidiary findings on issue of prejudice, so that it may be determined whether his conclusions regarding prejudice or lack thereof are warranted).

Normally, these erroneous findings would require recommittal for the judge to make new findings on the issues of notice, knowledge and prejudice. However, these errors, in combination with the errors created by the judge's failure to apply our holding in Wambugu, supra, and his expansion of the scope of the recommittal order lead us to conclude that reassignment to a different judge is appropriate.

On appeal, the employee further argues that the judge merely gave lip service to our determination in Wambugu, supra, that, as a matter of law, the adopted portions of Dr. Kenny's opinions establish the employee suffered a worsening of her right shoulder condition as a result of her work at Christopher House. The employee maintains that the judge ignored the legal effect of this holding to support his conclusion that the employee

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Motion to Join, 2-3.) The board file does not contain a transcript of the October 2011 motion session.

had failed to prove entitlement to either incapacity or medical benefits from AIM, the insurer of Christopher House. (Employee br. 1-3.) Atlantic Charter, which also appealed, similarly argues that, under the successive insurer rule, AIM is responsible for the employee's right shoulder claim. (Atlantic Charter br. 2.) We agree.

In his recommittal decision, the judge essentially found it was impossible for him to apply the successive insurer rule to the facts of this case. (Dec. II, 18-20.) This conclusion appears to be rooted in the judge's *unsolicited* opinion that the successive insurer rule is "intrinsically unfair," an opinion he expressed in both his first and second decisions. (Dec. II, 16-17; Dec. I, 14.)

> The successive insurer rule requires,
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> Where incapacity results from the combined effect of several distinct personal injuries received during the successive periods of coverage of different insurers the result is not an apportionment of responsibility on the part of either or any insurer at the election of the employee. The implication of the act is that only one of the successive insurers is to make compensation for one and the same incapacity.

Evans's Case, 299 Mass. 435, 436-437 (1938). Despite the judge's correct statement of the successive insurer rule, ("[A]ll that is required is that an industrial accident contributed to a slight degree to the injured worker's disability or need for treatment in order for the second insurer to bear the full brunt of an award," [Dec. II, 16-17; Dec. I, 14]), and our holding that it applies, Wambugu, supra, the judge has once again failed to apply it.[7]

The judge first strays from the order of recommittal by adopting statements of fact and opinions of medical providers he did not adopt in his first decision. (Dec. II, 10-13.)[8]

[7] We note that none of the parties challenges the applicability of the successive insurer rule. See, e.g., Sliski's Case, 424 Mass. 126 (1997)(applying successive insurer rule's policy of non-apportionment where employee suffered left hand injury with one employer and severe spinal injury with the second employer; court points out that burden of such an approach on second insurers is mitigated by the application of G.L. c. 152, § 37, which provides reimbursement to second insurers through a trust fund administered by the State Treasurer).

[8] Some of those statements and opinions, such as those of Dr. Thomas Goss, (Dec. II, 10, 12), are, according to Dr. Kenny, not consistent with Dr. Kenny's opinion. (Dep. 29-37.)

The judge, however, was not charged with adopting new medical evidence, but with making new findings of fact and rulings of law based on a correct application of the law to the only medical opinion he adopted in the first decision, that of Dr. Kenny, the § 11A examiner. Wambugu, supra at 58-59. The judge then based his denial of the employee's claim for both incapacity and medical benefits against AIM on the following findings which misconstrue Dr. Kenny's opinion and misapply the applicable law:

> [T]he employee's right shoulder problems
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> - o developed before she ever began work at Christopher House.
> - o felt worse during the **32-month period** that she worked at Christopher House, and
> - o continued to worsen during the **4 years** subsequent to her last day of work at Christopher House, even though she was not working anywhere.

(Dec. II, 18; emphasis in original.)[9] The judge then inferred that

> [T]he worsening of the employee's right shoulder condition during this period was at least partially the natural progression of her continuously deficient left shoulder, and the concomitant overuse of her right upper extremity necessarily resulting therefrom. However, the evidence does not differentiate between what the employee did at Christopher House and what she did away from employment.

Id. at 18-19. (Emphasis in original.) The judge continued:

> It would be speculative for any finder of fact to conclude that *disability* beginning in January 2011 - a period commencing with surgery for a condition, i.e., her LEFT SHOULDER that arose from a 2007 industrial accident with another employer altogether, and continuing through post-surgery recovery – resulted from the employment which she had been performing for the previous immediate 32 months (May 2008 through January 2011), given that she made no report or claim of an industrial injury to her RIGHT SHOULDER, i.e., a different body part, during those 32 months.
>
> This begs the questions of
>
> - how a fact finder is to differentiate between her activities at Christopher House from[sic] her activities outside of work;

[9] The judge reiterated these concerns at least two more times. (Dec. II, 19, 20.)]

- how a fact finder is to differentiate between her activities at Christopher House from [sic] her activities in the years since she last worked there in January 2011;
- how a factfinder is to determine whether the LEFT shoulder injury, which was treated with unsuccessful surgery, ever ceased to be disabling for her;
- And if it did, how a factfinder is to determine exactly when that was.

I cannot speculate on the answers to these questions.

(Dec. II, 20; emphasis in original.) Almost all these statements reflect a misapprehension or misapplication of the law.

First, there was no need for the judge to determine the extent to which the second injury to the employee's right shoulder contributed to her disability or need for treatment, or to what extent the left shoulder continues to disable her, as the judge seems to believe. As long as the employee's work at Christopher House contributed "even to the slightest extent," Rock's Case, 323 Mass. 428, 429 (1948) to the employee's disability or need for treatment, AIM, the insurer for Christopher House, is liable for the employee's incapacity and medical benefits, assuming the employee's claim against AIM is not defeated on other grounds. Wambugu, supra at 58. Thus, even if the 2007 left shoulder injury continues to be a cause of her disability, or even the major cause of such disability, AIM is on the risk for the ensuing benefits because, as a matter of law, the employee suffered a subsequent injury at Christopher House which played a role in her disability. As the court in Fitzpatrick's Case, 33 Mass. 298 (1954), explained in no uncertain terms:

> Where an employee has suffered *two compensable injuries*, the insurer covering the risk at the time of the more recent injury bearing a causal relation to the *disability* must pay the entire compensation. This is so even if the incapacity would have been less if he had not suffered the previous injury or . . . if the last injury "was *even to the slightest extent a contributing cause* of the subsequent disability," Rock's Case, 323 Mass. 428, 429 [(1948)], or "although the earlier injury may have been a contributing cause or even the major contributing cause," Morin's Case, 321 Mass 310, 312 [(1947)], or where "Undoubtedly the earlier work for . . . [the former employer] was a cause of the most recent disability." Tassone's Case, 330 Mass. 545, 547 [(1953)], and cases cited. Peters's Case, [331 Mass. 188 (1954)].

Fitzpatrick's Case, supra at 300. (Emphasis added.)

Furthermore, the judge's concern with his inability to differentiate between the employee's activities at Christopher House and those outside of work during and after her employment at Christopher House is misplaced. " '[N]on-work-related activity which is normal and reasonable, and not performed negligently in light of the employee's impairment does not constitute an intervening cause, if . . . some causal connection to the original industrial injury remains.' " Davoll v. Parmenter VNA & Community Care, Inc, 24 Mass. Workers' Comp. Rep. 15, 19 (2010), quoting from Drumond v. Boston Healthcare for the Homeless, 22 Mass. Workers' Comp. Rep. 343, 345 (2008). Here, the judge did not find the employee performed activities outside of work that were abnormal or unreasonable, or negligently carried out. The only findings he made regarding her non-work-related activities were that "[t]he employee also testified that she engaged in normal routines of daily life during that 32-month period [that she worked for Christopher House]," (Dec. II, 9), and that there was no indication she was assisted in performing her activities of daily living, as she testified she was aided in performing her work duties at Christopher House. (Dec. II, 18.) These statements do not support a finding that an intervening cause severed the causal relationship between the employee's right shoulder injury at Christopher House and her current disability.

Similarly, the judge's concern that the employee's overuse of her right shoulder began before she began work at Christopher House is also misplaced. There are no findings, nor is there any evidence, of an intervening event breaking the causal chain during the time between her initial compensable left shoulder injury in 2007, and the beginning of her employment at Christopher House five months later. See Davoll, supra.

The judge, however, continues to mischaracterize Dr. Kenny's opinion by repeatedly adopting his initial opinion stated in his September 24, 2011, report, (Dec. II, Ex. 10), that the employee's right shoulder impingement syndrome was causally related to her 2007 injury. (Dec II, 13-15.) There is no doubt that the employee's overuse of her right shoulder was necessitated by her left shoulder injury. However, Dr Kenny's updated opinion, expressed in his 2014 report (Dec. II, Ex. 8), and at deposition, was that the employee's work at Christopher House caused her right shoulder impingement

syndrome to worsen. In fact, Dr. Kenny explained at his deposition that he *did not change* his opinion that the cause of the employee's need for treatment of her right shoulder was her work at Christopher House; rather, he had simply never been asked the question. Had he been asked in September of 2011, he testified he would have made the same statement regarding worsening. (Dep. 51-52, 26-27.)[10] The judge also fails to acknowledge the repetitive nature of the employee's injury by finding her testimony credible that she never injured her right shoulder while at Christopher House, although her shoulder felt worse as time went on during the period she worked there. (Dec. II, 17.) See Trombetta's Case, 1 Mass. App. Ct. 102 (1973)("[a]n injury may develop gradually from the cumulative effect of stresses and aggravations"). Furthermore, he continues to infer that "the worsening of the employee's right shoulder condition . . . was at least partially the natural progression of her continuously deficient left shoulder," (Dec. II, 18), a finding that would signify a recurrence rather than an aggravation or new injury. See Gentile v. Carter Pile Driving, Inc., 17 Mass. Workers' Comp. Rep. 435, 438 (2003). Thus, although the judge acknowledges, "The Reviewing Board has established that, as a

[10] Dr. Kenny also explained why his two seemingly disparate causation opinions were not actually different:

> A: Well, when I'm speaking of causality, I always assume that I'm asked to talk about a major cause. And as far as I'm concerned, the work-related incident of 10/10/2007 was the major cause of her problems with her right shoulder because the injury to the left shoulder was so severe that she could not—that she could not use the left shoulder and she had to over – she had to rely heavily on it to a pathological degree.
>
> Now the hypothetical question didn't ask me is the work at the Christopher House a major cause of her symptoms, disability and need for treatment. It just simply asked me, Did it cause a worsening of her original injury. I don't see that that's the same question. I don't see that my response speaks to the same idea. I see that there's a considerable difference between the two ideas, and so I don't see that there's any inconsistency.

(Dep. 24-25.) The Doctor's observation is legally correct. As discussed above, the right shoulder impingement syndrome need not be a "major cause" of the employee's disability, but only "to the slightest extent a contributing cause." Rock's Case, supra at 429.

matter of law, this worsening of her right shoulder while at Christopher House, a successive employer and insured by a successive insurer, constituted an industrial injury," (Dec. II, 17), his findings reveal his disagreement with that determination, and an unwillingness or inability to apply the successive insurer rule appropriately.

In Wambugu, supra, we held that the employee's right shoulder worsened as a result of her employment at Christopher House, thus bringing the successive insurer rule into play. Properly applied, and absent other disqualifying findings, that rule imposes liability on AIM for all benefits due. We recommitted the case for the judge to make findings on the issues he had not decided, which included extent of incapacity; in addition, he was to make further findings on her claim for medical treatment for her right shoulder. Despite the fact that the judge had all the information he needed to make an incapacity finding,[11] and a finding regarding entitlement to right shoulder treatment, he set up roadblocks to making those determinations and found reasons, albeit erroneous ones, for denying the employee's incapacity and medical claims against AIM.

Had the judge denied the employee's claims against AIM due to a finding, supported by the evidence, that the employee failed to give timely notice of her injury, his denial would be understandable. However, that was not the reason the judge gave for denying the employee's claims. (Dec. II, 23-24.) Rather, the judge found that "the employee has failed to establish that it is more likely than not that an industrial injury to her right shoulder, sustained while employed at Christopher House, caused her to become disabled from employment," (Dec. II, 23), or "to require medical treatment." Id. at 24. The finding regarding medical treatment is particularly puzzling, because the judge ordered Atlantic Charter to pay for "all treatment of her right shoulder conditions" in the first decision. (Dec. I, 17.) It is apparent that the judge simply could not see his way to

[11] In fact, the judge adopted Dr. Kenny's opinions that the employee was permanently and totally incapacitated from her job as a CNA as a result of her left and right shoulder injuries and was restricted to lifting 10 pounds occasionally and to performing work below waist level. (Dec. II, 11, 13; Exs. 8 and 10.)

correctly applying the law to the facts he had found, based on the medical evidence he had adopted.

The judge's stated inability to comply with our order of recommittal and apply the law properly, as well as his factual errors regarding notice, knowledge and prejudice, have caused us to question the efficacy of a second recommittal. Accordingly, we think it appropriate to vacate the decision and transfer the case in its entirety to the senior judge for assignment to a different administrative judge for a hearing de novo on the employee's claims. See Lafleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393 (2011) (disregard of order of recommittal is reason to reassign case to another judge); see also Luster v. Poly Medical Lab, Inc., 2 Mass. Workers' Comp. Rep. 81, 84 (1988)("the better course is to assign the case to a different Administrative Judge"). Since the hearing will be de novo, the new judge, of course, is not bound by any of the current judge's findings of fact or rulings of law made in either of his hearing decisions in this case.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board for review a duly executed fee agreement between employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is received and approved by this board.

So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***December 4, 2019***

Martin J. Long
Administrative Law Judge