

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 040850-03

Nelson Morillo
Marcor Holdings, Inc.
Zurich North America Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Koziol)

The case was heard by Administrative Judge Heffernan.

APPEARANCES

Gillian B. Schiller, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Richard J. Florino, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision in which the administrative judge denied the employee's claim for a closed period of partial incapacity benefits, and imposed § 14(2) fraud sanctions against the employee.¹ The sole argument on appeal is that the judge erred by failing to award employee's counsel a § 13A(5) fee for prevailing at the hearing.² We agree.

¹ General Laws c. 152, § 14(2), provides, in part:

If it is determined that in any proceeding within the division of dispute resolution, a party, including an attorney or expert medical witness acting on behalf of an employee or insurer, concealed or knowingly failed to disclose that which is required by law to be revealed, knowingly used perjured testimony or false evidence, knowingly made a false statement of fact or law, participated in the creation or presentation of evidence which he knows to be false, or otherwise engaged in conduct that such party knew to be illegal or fraudulent, the party's conduct shall be reported to the general counsel of the insurance fraud bureau. Notwithstanding any action the insurance fraud bureau may take, the party shall be assessed, in addition to the whole costs of such proceedings and attorneys' fees, a penalty payable to the aggrieved insurer or employee, in an amount not less than the average weekly wage in the commonwealth multiplied by six.

The employee's claim for § 35 benefits and the insurer's complaint for § 14(2) fraud were joined at conference. The judge denied both, and the parties cross-appealed.³ At hearing, the employee claimed § 35 benefits from March 5, 2004 to July 13, 2005, which claim the insurer defended by raising liability, causal relationship and extent of disability. The insurer also sought recoupment of all benefits paid and sanctions pursuant to § 14(2) against the employee. (Dec. 3-4.)

While the judge did find fraud pursuant to §14 (2), he also found that an industrial accident occurred. Although he ordered recoupment by the insurer of some of the benefits previously paid, the judge nevertheless found that the employee was entitled to retain § 34 and § 35 benefits for several specific periods prior to March 5, 2004.⁴ No weekly benefits *claimed* by the employee for the period of March 5, 2004 to July 13, 2005 were awarded. (Dec. 3, 32-34.)

² General Laws c. 152, § 13A(5), provides, in pertinent part:

Whenever . . . the employee prevails at [a] hearing [pursuant to section eleven] the insurer shall pay a fee to the employee's attorney

³ The August 1, 2005 conference order denying the employee's claim and the insurer's § 14 complaint was the result of a *second* conference proceeding not authorized by statute. (Dec. 4.) The first conference order, filed on May 19, 2005, awarded the employee § 35 benefits from May 18, 2005, and continuing, and both parties appealed. The second conference was convened on August 1, 2005, at the request of the insurer. The judge clearly had no authority to "correct" the first conference order in a substantive fashion, after the parties had appealed. (Dec. 4.) However, neither party is challenging the error. In any event, the procedural irregularity does not affect our decision because our conclusion would remain the same under either scenario, where, at hearing, the insurer contested liability and sought recoupment of all benefits paid.

⁴ The judge awarded § 34 temporary total incapacity benefits at the rate of \$317.30, based on an average weekly wage of \$528.83, from December 16, 2003 to December 30, 2003. He also awarded partial incapacity benefits pursuant to § 35, based upon an average weekly wage of \$528.83 and the employee's actual wages, from January 4, 2004 to February 4, 2004, and reasonable and related medical expenses pursuant to §§ 13 and 30 for the period from December 16, 2003 through February 4, 2004. (Dec. 33.)

The judge's finding of an industrial injury means that the employee prevailed on liability. (Dec. 32.) This alone, of course, does not support the award of a § 13A(5) attorney's fee. See Gonzalez's Case, 41 Mass. App. Ct. 39, 41 (1996)(as monetary award is principle goal in prosecuting claim, establishment of liability without benefits is not "prevailing" for hearing fee purposes). However, because the insurer appealed from the conference order, contesting liability and seeking full recoupment of all benefits paid,⁵ [5] the employee's retention of some of the benefits the insurer sought to recoup at hearing means that he "achieved 'some of the benefit' sought in the controversy." Connelly's Case, 41 Mass. App. Ct. at 35, 38 (1996) quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978); Auger v. Anheuser Busch Co., Inc., 19 Mass. Workers' Comp. Rep. 25, 26-27 (2005)(employee prevailed by successfully defending against recoupment complaint). By retaining some of the benefits that the insurer contested at hearing, the employee prevailed for § 13A(5) purposes. See Connolly, supra at 38 (retention of benefits in face of recoupment exposure meets "prevailing" standard under § 13A[5]); Giunta v. Unifirst Corp., 22 Mass. Workers' Comp. Rep. 137, 139 (2008). A § 13A(5) fee thus was due, and the judge erred in failing to award it.

Accordingly, we award that hearing fee in the amount of \$5,233.64. In all other respects, the decision is affirmed.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

⁵ General Laws c. 152, § 8(1), provides in pertinent part:

An insurer which makes timely payments pursuant to subsection one of section seven [commencement of payment within fourteen days of initial notification or claim], may make such payments for a period of one hundred calendar days from the commencement of disability without affecting its right to contest any issue arising under this chapter.

We consider the insurer's claim to recoupment to be an "issue arising under this chapter."

Nelson Morillo
DIA Board No. 040850-03

William A. McCarthy
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **September 9, 2009**