COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 002821-04

Neville Gayle	Employee
NSTAR Electric and Gas	Employer
NSTAR Electric and Gas	Self-Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Fabricant and Koziol)

The case was heard by Administrative Judge McDonald.

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing
James Riley Hodder, Esq., and James N. Ellis, Esq., for the employee on appeal
Joseph S. Buckley, Jr. Esq., for the self-insurer at hearing and on appeal
Richard W. Jensen, Esq., for the self-insurer on brief

COSTIGAN, J. The employee appeals from a decision in which the administrative judge denied his claims for § 34A permanent and total incapacity benefits and for § 36 specific injury benefits; discontinued § 35 benefits as of the date of the § 11A impartial examination; denied the self-insurer's complaint for § 14 fraud sanctions; and failed to award an attorney's fee. The employee argues, inter alia, that because he "prevailed" by defeating the self-insurer's § 14 complaint, his attorney is entitled to a fee under § 13A(5). We agree, and recommit the case for further findings on the amount of the fee.

Neville Gayle, a sixty-three year-old lineman, was injured on January 29, 2004, when the side view mirror of a passing vehicle struck him in the back. (Dec. 5.) The self-insurer accepted liability for the injury and paid weekly § 34 total incapacity benefits. (Dec. 14.) The employee subsequently filed a claim for § 36(j) and (k) benefits for permanent loss of bodily function and disfigurement, respectively.[1] At a § 10A conference on December 4, 2006, the judge allowed

[1] The employee claimed $13,535 for loss of bodily function and $15,000 for disfigurement attributable to a limp and his use of a cane.

both the employee's motion to join a claim for § 34A permanent and total incapacity benefits and the self-insurer's motion to join a modification/discontinuance complaint. (Dec. 2.) Following the conference, the judge denied the employee's §§ 34A and 36 claims, and ordered the self-insurer to pay the employee weekly § 35 partial incapacity benefits at the maximum rate from the date of expiration of § 34 benefits. Both parties appealed to a hearing de novo. (Dec. 2.)

At hearing, the self-insurer challenged the extent of the employee's disability and causal relationship, raised the affirmative defense of § 1(7A), denied the employee was entitled to § 36 benefits, and contended the employee was subject to sanctions under § 14(2) and (3)[2] for fraudulent conduct.[3] In his decision, the judge adopted the opinion of the § 11A impartial

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[2] General Laws. c. 152, § 14, provides, in relevant part:

> (2) If it is determined that in any proceeding within the division of dispute resolution, a party . . . 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. . . .
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> (3) [A]ny person who knowingly makes any false or misleading statement, representation or submission or knowingly assists, abets, solicits or conspires in the making of any false or misleading statement, representation or submission, or knowingly conceals or fails to disclose knowledge of the occurrence of any event affecting the payment, coverage or other benefit for the purpose of obtaining or denying any payment coverage, or other benefit under this chapter . . . shall be punished by imprisonment in the state prison for not more than five years or by imprisonment in jail for not less than six nor more than two and one-half years or by a fine of not less than one thousand nor more than ten thousand dollars, or by both such fine and imprisonment.

[3] In his decision, the judge correctly listed the sections of the statute raised by the self-insurer as "§ 14(2), (3)," but incorrectly identified the prohibited behavior as "unreasonable prosecution of claim." (Dec. 2.) Section 14(1) assesses the whole costs of the proceeding against the employee

physician, Dr. Daniel Quinn, who examined the employee on February 13, 2007. Dr. Quinn opined the employee sustained a contusion to his lumbar spine in the incident of January 29, 2004, which combined with pre-existing, multi-level degenerative disc disease and spinal stenosis. He further opined the industrial injury played very little role in the employee's complaints when examined.[4] Based on Dr. Quinn's opinion, the judge found that as of the date of the impartial examination, the work injury was no longer a major cause of the employee's

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or his counsel if the proceedings are brought or defended without reasonable grounds, which was not the self-insurer's contention. We take judicial notice of the insurer's hearing memorandum, contained in the board file, which reflects the self-insurer raised the fraud provisions of §§ 14(2) and 14(3). Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). Moreover, the judge correctly referred to "fraud or false representation" in his findings on the § 14 complaint. (Dec. 15.) Thus, we deem harmless the judge's error in initially identifying the subject matter of the § 14 claim as unreasonable prosecution. (Dec. 15.) In any event, as we recently decided, successful defense of a self-insurer's § 14(1) complaint also constitutes prevailing for the purpose of a § 13A(5) fee. Vazquez v. Target Corporation, 23 Mass. Workers' Comp. Rep. ___ (November 30, 2009).

[4] Doctor Quinn wrote:

> Based on my history, physical examination, and review of the records, Mr. Neville Gayle suffered from longstanding spondylosis of his lumbar spine. He suffered a contusion to the lumbar spine, which can certainly exacerbate symptoms, but I would expect the inflammatory reaction and subsequent healing process to take approximately 6-12 weeks. During the time since the injury, he has certainly had progression of his spondylosis, but my opinion is that it is in no way related to his initial contusion that he suffered on January 29, 2004. . . . With respect to his work-related injury, he has obtained a maximum medical endpoint, and I would concur with Dr. Floyd's assessment that a small degree of chronic disability can be attributed to the contusion suffered at work . . . but the majority of his disability can be attributed to his preexisting spondylosis and the expected progression over the course of several years. For that reason, I find him capable to [sic] any sedentary or semi-sedentary work. This would have been true in the 6-12 weeks subsequent to the injury.

(Ex. 2.)

disability and need for treatment.[5] He therefore discontinued the employee's § 35 benefits as of that date, February 13, 2007. For the same reasons, the judge also denied the employee's § 36 claims.[6] (Dec. 15.) Nevertheless, the judge found § 14(2) and (3) sanctions were not warranted:

> Although the employee has not prevailed in his claims, I do not find that it is the result of fraud or false representation by the employee or any party acting on his behalf. The employee does have restrictions on his activity based upon the presence of degenerative processes. These restrictions are supported by the various medical opinions that are in evidence. The employee occasionally feels more comfortable when he uses a cane when walking outside. The defeat of the employee's claims is the result of the probative value of the expert medical opinions I have adopted, as well as the credibility of the various witnesses.

(Dec. 15.)[7] The judge therefore denied the self-insurer's § 14 complaint, without awarding an attorney's fee. Id.

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[5] The judge also adopted the opinion of Dr. Giles Floyd, the self-insurer's § 45 examining physician, that the "aggravating factor" of the employee's work injury was a minor contusion, and the employee had "no objective residual" from the work injury at the time of the examination. (Dec. 8-9.)

[6] With respect to the non scar-based disfigurement the employee claimed under § 36(k), the judge found there was no dispositive medical opinion that the employee required a cane when walking. Indeed, his testimony that he did had been refuted by the results of the self-insurer's surveillance. Regarding permanent loss of bodily function benefits pursuant to § 36(j), the judge adopted the opinion of the self-insurer's medical expert, Dr. Floyd, that the employee had "no objective 'specific orthopaedic pathological abnormality directly attributable to the January 29, 2004, contusion of the low back region.' " (Dec. 14.)

[7] Although the self-insurer raised § 14(3) against the employee, we observe this department lacks jurisdiction to hear that issue. Ahaesy v. The Flatley Co., 10 Mass. Workers' Comp. Rep. 322, 323 n.2 (1996)(Section 14(3) "addresses criminal remedies for fraudulent activity, jurisdiction over which clearly does not lie within the Industrial Accident Board").

On appeal, the employee argues that although he did not prevail in his § 34A and § 36 claims for compensation, he nevertheless prevailed against the self-insurer's § 14 complaint, and his attorney is thus entitled to a fee under § 13A(5).[8] [8] We agree.

In Richards's Case, 62 Mass. App. Ct. 701 (2004), the court upheld this board's long-standing position, first announced in Talbot v. Stanton Tool & Mfg., Inc., 11 Mass. Workers' Comp. Rep. 528 (1997), that an employee who successfully defends against an insurer's § 14 fraud complaint "prevails" within the meaning of § 13A(5), even if the employee's claim for benefits is denied. The court based its holding on the plain and unambiguous language of § 13A(5):

Here, the insurer indisputably filed a § 14 fraud complaint against the employee, in addition to a complaint (alleging the employee had not suffered a compensable injury) that contested his claim for benefits. The employee unquestionably prevailed with respect to the § 14 fraud complaint, achieving (in the words of the reviewing board majority [in Richards v. Ultimate Chimney Sweep, 15 Mass. Workers' Comp. Rep. 301, 304 (2001)]), "an unequivocal and unambiguous success" against that complaint. No further analysis is required under the statute.

Id. at 706.[9] [9] See also, Johnson's Case, 69 Mass. App. Ct. 837, 839-840 (2007). As in those cases, here, "the employee falls within the typical 'prevailing party' formulation of one who

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

> Whenever an insurer files a complaint or contests a claim for benefits and . . . the employee prevails at such hearing, the insurer shall pay a fee to the employee's attorney. . . .

[9] The Appeals Court also approved the reviewing board's refusal to apply 452 Code Mass. Regs. § 1.19(4) "so literally as to restrict and contradict the scope and generality of the plain language of the statute. . . ." Richards, supra at 706-707. That regulation provides, in pertinent part:

> 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. . . .

succeeds on any significant litigation issue, achieving 'some of the benefit' sought in the controversy." Connolly's Case, 41 Mass. App. Ct. 35, 38 (1996), quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978); see also Conroy's Case, 61 Mass. App. Ct. 268, 274 (2004), and Cruz's Case, 51 Mass. App. Ct. 26, 28 (2001).

Lastly, we note that subsequent to the court's decision in Richards, supra, but prior to the filing of the judge's decision, the department's adjudicatory rules were revised to explicitly conform to and incorporate the Appeals Court's and the reviewing board's holdings on this issue: "For purposes of M. G. L. c. 152, § 13A(5), the employee shall be deemed to have prevailed when an insurer's M. G. L. c. 152, § 14 fraud complaint is denied and dismissed." 452 Code Mass. Regs. § 1.19 (5), effective March 21, 2008.

Accordingly, we hold the employee was entitled to the award of a § 13A(5) hearing fee, and we recommit this case to the administrative judge for a determination, under all of the circumstances, of the amount of such attorney's fee. See G. L. c. 152, § 13A(5)("An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney"). We summarily affirm the decision as to other issues raised by the employee.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

Filed: **December 18, 2009**