

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 032237-04

Ormand Hamilton
S.R.D.C., Inc.
Associated Employers Insurance Co

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

The case was heard by Administrative Judge Constantino.

APPEARANCES

Rickie T. Weiner, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Peter P. Harney, Esq., and Holly B. Anderson, Esq., for the insurer

HORAN, J. The employee appeals from a decision denying his claim for workers' compensation benefits for an October 8, 2004 work-related neck and back injury. We affirm the decision.

The insurer paid the employee \$ 34 total incapacity benefits from the date of injury until December 6, 2004. The employee then claimed ongoing incapacity and medical benefits from December 7, 2004. The judge denied the claim at conference; only the employee appealed. (Dec. 2.) At hearing, the insurer did not challenge the employee's entitlement to the weekly \$ 34 benefits it had paid previously. See G. L. c. 152, § 10A(3).¹

¹ General Laws c. 152, § 10A(3), provides, in pertinent part:

Failure to file a timely appeal . . . shall be deemed to be acceptance of the administrative judge's order and findings, except that a party who has by mistake, accident or other reasonable cause failed to appeal an order within the time limited herein may within one year of such filing petition the

In his hearing decision, the judge adopted the opinions of the insurer's medical expert, Dr. Thomas P. Goss, and the § 11A impartial medical examiner, Dr. Daniel Tanenbaum. (Dec. 10.) He also credited the testimony of three lay witnesses. Id. The judge concluded:

I am not persuaded based on the lay testimony and based on the medical testimony that Mr. Hamilton was incapacitated from gainful remunerative employment as of that [December 7, 2004] date. I specifically adopt the medical opinion of Dr. Goss that Mr. Hamilton was capable of gainful employment as of late November 2004.

(Dec. 9.) The judge denied and dismissed the employee's claim, but did find "that the employee's disability prior to December 2004 was causally related to the employment." (Dec. 11.)

The employee raises two issues on appeal; we address one, and otherwise summarily affirm the decision. G. L. c. 152, § 11C.

The employee argues the judge erred by denying him an attorney's fee because he prevailed at hearing on the "causality issue." (Employee br. 16.) The argument lacks merit. Only the employee appealed the conference order. Therefore, no benefits previously paid by the insurer were in jeopardy of being recouped. G. L. c. 152, § 11D; see Connolly's Case, 41 Mass. App. Ct. 35, 38 (1996). Although the judge found a causal relationship existed between the employee's industrial accident and his disability prior to December 7, 2004, the decision ordered no payment of compensation benefits. Therefore, no fee is due. See Gonzalez's Case, 41 Mass. App. Ct. 39, 42 (1996).

The decision is affirmed.

So ordered.

commissioner of the department who may permit such hearing if justice and equity require it. . . .

Ormand Hamilton
Board No. 032237-04

Mark D. Horan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **April 7, 2009**