COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS.: 044555-02
003958-04

Robert Giunta	Employee
Unifirst Corporation	Employer
Unifirst Corporation	Self-Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Horan)

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Brian Sullivan, Esq., for the self-insurer at hearing
Gordon L. Sykes, Esq., for the self-insurer on appeal

FABRICANT, J. The employee appeals from an administrative judge's decision awarding him ongoing § 35 benefits for an industrial injury occurring on November 5, 2002, but denying his claim for compensation for injuries allegedly occurring on November 22, 2002 and February 9, 2004. The employee argues that having "prevailed" within the meaning of § 13A(5), the judge erred by failing to award an attorney's fee. We agree, award the fee due, and otherwise summarily affirm the decision.

Following a § 10A conference, the administrative judge ordered the self-insurer to pay the employee ongoing § 35 partial incapacity benefits from February 6, 2006, to date and continuing, plus medical benefits. (Dec. 2-3.) Both parties appealed to a de novo hearing.[1] Prior to hearing,

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[1] Both at hearing and in his decision, the judge stated that only the employee appealed to hearing. (Dec. 3; Tr. 6.) However, these statements are incorrect. The board file indicates that both parties appealed to hearing, and the parties in their appeal briefs are in agreement on this point. (Appeal of Conference Order [by insurer], 4/18/06; Appeal of Conference Order [by employee], 4/21/06; Self-ins. br. 2; Employee br. 3.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (reviewing board may take judicial notice of documents in the board file.) The judge's error on this issue may explain why he did not order an attorney's fee.

the employee was allowed to join a claim for benefits alleging a second work-related injury to his knee on February 9, 2004. (Dec. 3; Employee's claim dated 5/4/06.) At hearing, the self-insurer contested liability, disability and extent thereof, causal relationship, and entitlement to §§ 13 and 30 medical benefits, but stipulated to liability for the original November 5, 2002 knee injury. (Dec. 3.)

Although the judge awarded the employee ongoing § 35 partial incapacity benefits beginning on February 6, 2006, he also increased the employee's earning capacity from that assigned at conference, thereby decreasing the § 35 weekly compensation rate.[2] Pursuant to § 11D, he allowed the self-insurer to recoup any overpayments, and declined to award the employee's attorney a fee. (Dec. 7-9.)

On appeal, the employee maintains he prevailed by retaining § 35 benefits at hearing, thereby entitling his attorney to a fee. The self-insurer maintains the employee did not prevail because benefits were reduced from those awarded at conference, and the insurer was allowed to recoup overpayments from the employee.

We agree with the employee that he prevailed at hearing within the meaning of § 13A(5). That section provides, in relevant part: "[w]henever an insurer . . . contests a claim for benefits and the employee prevails at [a § 11 hearing,] the insurer shall pay a fee to the employee's attorney. . . ." See Connolly's Case, 41 Mass. App. Ct. 35, 36 (1996) (The regulations applicable at the time of hearing define what is meant by "prevails").

> [T]he claimant shall be deemed to have prevailed . . . when compensation is ordered or is not discontinued . . . *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

[2] At conference, the judge ordered the insurer to pay the employee § 35 benefits at the rate of $292.50 per week, based on an average weekly wage of $650 and an assigned earning capacity of $162.50. In his hearing decision, the judge awarded § 35 benefits, from February 6, 2006 to December 31, 2006, at the rate of $228 per week, based on an earning capacity of $270 per week, and from January 1, 2007 forward, at the rate of $210 per week, based on an earning capacity of $300 per week. The judge also found the medications being prescribed the employee were neither reasonable nor necessary, and denied the employee's § 8 claim that the self-insurer had underpaid benefits awarded at conference.

> does not direct a payment of weekly or other compensation benefits exceeding that being paid by the insurer prior to such decision . . .

452 Code Mass. Regs. § 1.19(4)(emphasis added). See Green's Case, 52 Mass. App. Ct. 141, 144 (2001)(regulation is not in conflict with § 13A or with court's decision in Connolly's Case, supra). The courts have further explained that an employee prevails if he " 'succeeds on any significant litigation issue, achieving "some of the benefit" sought in the controversy.' " Cruz's Case, 51 Mass. App. Ct. 26, 28 (2001), quoting Connolly's Case, supra at 38 (citation omitted). Accord Conroy's Case, 61 Mass. App. Ct. 268, 273-274 (2004); Richards' Case, 62 Mass. App. Ct. 701, 707 n.15 (2004).

Moreover, where the benefits awarded at conference are placed in jeopardy by the insurer's appeal, the employee prevails when he retains some of them. See Conroy's Case, supra (in absence of definitive statement in hearing memorandum or stipulation of the parties limiting disputed period to date of impartial medical examination, employee's benefits awarded at conference were in jeopardy); Connolly's Case, supra at 37 ("all the benefits granted in the conference order were in jeopardy" where both employer and employee appealed conference order awarding closed period of § 34 benefits). Thus, an employee may prevail, even though his weekly compensation benefits are reduced. Cruz's Case, supra (employee prevailed even though his weekly compensation benefits were reduced at hearing, where insurer's appeal placed entire entitlement to compensation in jeopardy); Badea v. Hasbro, Inc., 22 Mass. Workers' Comp. Rep. ___ (May 6, 2008)(though employee's benefits were reduced at hearing and insurer withdrew its appeal of conference order, employee nevertheless prevailed where self-insurer alleged intervening accident severed causal connection between employee's industrial accident and alleged incapacity, thereby requiring employee to prove entitlement to compensation after date of intervening accident).

Here, the self-insurer and the employee appealed the conference order, and the employee's benefits were not discontinued. See 452 Code Mass. Regs. § 1.19(4). The self-insurer disputed extent of disability and causal relationship for the November 5, 2002 knee injury (for which it stipulated it was liable), and disputed liability, disability and causal relationship for the other alleged injuries. It thereby placed in jeopardy all the employee's benefits after February 6, 2006.[3]

[3] The self-insurer clearly challenged extent of disability and causation for the accepted November 5, 2002 knee injury since it appealed the conference order which was based only on that date of injury. After the claim for later dates of injury was added, the self-insurer did not limit its defenses to those later dates. See Conroy's Case, supra at 277.

By retaining some of the challenged benefits, the employee prevailed on a significant litigation issue. In addition, he succeeded in establishing liability for his back and right hip injuries.

Citing Connolly's Case, supra, the self-insurer contends it is not logical that the employee could be required to reimburse the self-insurer for overpayments and still prevail. There the court noted that "had the administrative judge, responding to the employer's appeal, in any way reduced the temporary disability payments awarded by the conference order, the employee would have been exposed to a recoupment claim by the employer for the recovery of overpayments pursuant to § 11D(3)." Id. at 37-38. However, the court did not indicate that an order of recoupment would necessarily mean the employee had not prevailed.[4] Indeed, where weekly benefits are reduced, a recoupment order is always possible.[5] The judge's order of recoupment in this instance does not change the fact that the employee achieved some of the benefit he sought by securing an award of ongoing § 35 benefits, in the face of the self-insurer's appeal, thereby prevailing under § 13A (5), and 452 Code Mass. Regs. § 1.19(4).

Accordingly, we hereby amend the judge's decision and award the applicable statutory attorney's fee pursuant to § 13A (5) to employee's counsel in the amount of $4,925.03.[6] In all other respects, the decision is affirmed. Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,458.01.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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[4] Had the employee successfully defended against a complaint for recoupment, he would have prevailed, even had he not received any compensation benefits. Auger v. Anheuser Busch Co., Inc., 19 Mass. Workers' Comp. Rep. 25 (2005).

[5] Here, the insurer had not actually raised recoupment as an issue to be determined, but had reserved it. (Insurer's Hearing Memorandum.)

[6] As the employee's appeal to the reviewing board did not seek an enhanced fee, no recommittal on this issue is necessary.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **June 24, 2008**