

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 017488-10**

Russell F. Jones  
North Central Correctional Center  
Commonwealth of Massachusetts

Employee  
Employer  
Self-Insurer

**REVIEWING BOARD DECISION**

(Judges Koziol, Horan and Harpin)

The case was heard by Administrative Judge Benoit.

**APPEARANCES**

William H. Batty, Jr., Esq., for the employee  
Robin Borgstedt, Esq., for the self-insurer

**KOZIOL, J.** The self-insurer appeals from a decision awarding the employee § 34 total incapacity benefits from October 26, 2010, and continuing; interest pursuant to § 50; and an enhanced attorney's fee in the amount of \$6,500.00, plus necessary expenses. We address two of the self-insurer's seven claims of error.<sup>1</sup> We affirm the decision, with the exception of the judge's award of § 50 interest, which we reverse and vacate.

The self-insurer argues the judge acted arbitrarily and capriciously by awarding employee's counsel an enhanced attorney's fee because the judge's discretion to increase or decrease that fee must be based on the "complexity of the case or the effort *required in litigating the matter.*" (Self-ins. br. 18; emphasis added.)<sup>2</sup> The self-insurer's argument is flawed in two respects.

---

<sup>1</sup> In regard to the self-insurer's remaining assertions of error, we summarily affirm.

<sup>2</sup> The self-insurer does not take issue with the amount of the fee enhancement, only the fact that it was ordered. (Self-ins. br. at 18-19.) The standard base hearing fee on the date of the decision, July 30, 2012, was \$5,311.62. Circular Letter 339, issued October 4, 2011 and applicable on the date this decision was filed, increased the legal fee due an employee's attorney to \$5,311.62. See G. L. c. 152, § 13A(10)(providing for the annual adjustment of attorney's fees payable under § 13A[1]-[6] on October first of each year).

First, the argument rests on a misreading of the statute. General Laws c. 152, § 13A(5), states in pertinent part: “[a]n administrative judge may increase or decrease such fee based on the complexity of the dispute *or* the effort *expended by the attorney*.” (Emphasis added.) As written, the statute vests the judge with discretion to enhance or reduce the fee award by considering these separate factors, and we have interpreted the act as providing the judge with discretion to enhance or reduce fees based on *either* factor. We have held, “[t]he judge was in the best position to assess the time and effort expended by employee’s counsel in advancing the employee’s claim. We will not second-guess his determination in that regard. . . .” Guzman v. Act Abatement Corp., 23 Mass. Workers’ Comp. Rep. 291, 299 (2009)(citations omitted). In addition, “[a]ny decision to award an enhanced hearing fee should be grounded in the record evidence and based on specific factual findings about the complexity of the hearing dispute *or* the effort expended by the attorney at hearing.” Sylvester v. Town of Brookline, 12 Mass. Workers’ Comp. Rep. 227, 231-232 (1998)(emphasis added); Hernandez v. Crest Hood Foam Co., Inc., 13 Mass. Workers’ Comp. Rep. 445, 452 (1999)(upholding reduction in fee award where “it [was] apparent that the judge found the attorney’s effort was less than normal, and reduced the fee commensurately”); compare Hopkins v. Digital Equip. Corp., 13 Mass. Workers’ Comp. Rep. 295, 297 (1999)(vacating award where “judge’s stated reason for reducing the fee . . . does not comport with either reason specified in the statute”). The self-insurer changes the statute’s plain meaning by altering its language to include consideration of the “effort required in litigating the matter,” thereby eliminating from the judge’s consideration, the “effort expended by the attorney,” which focuses on the attorney’s work, as opposed to the nature of the litigation. There is no authority supporting this construction of § 13A(5).

Second, the self-insurer also fails to acknowledge that “[g]enerally, a determination that an increased fee is due is a discretionary ruling with which we will not interfere, DiFronzo v. J.F. White/Slattery/Perini Joint Venture, 15 Mass.

Workers' Comp. Rep. 193, 197 (2001), as long as the judge makes findings consistent with his statutory authority to award such an enhanced fee.” Mulkern v. Massachusetts Turnpike Authy., 20 Mass. Workers' Comp. Rep. 187, 200 (2006), citing Thompson v. Sturdy Memorial Hosp., 13 Mass. Workers' Comp. Rep. (1999). Here, the judge found employee's counsel “prepared a well-written Closing Argument cogently advocating for his client, I am awarding an enhanced attorney's fee.” (Dec. 6.) The self-insurer admits the submission of written closing arguments was optional. (Self-ins. br. 18; Tr. 82.) Both parties chose to exercise that option. (Dec. 3.) The judge clearly tied the fee enhancement to the effort expended by employee's counsel in drafting his written closing argument.<sup>3</sup> (Dec. 6.) Because that finding was consistent with the exercise of the judge's statutory authority, we affirm the enhanced fee award.

The self-insurer further argues the judge erred in ordering it to pay the employee § 50 interest because 1) the employee never claimed entitlement to interest; and, 2) Russo's Case, 46 Mass. App. Ct. 923 (1999), prohibits an award of interest against the Commonwealth of Massachusetts. (Self-ins. br. 20.) It has long been established that § 50 interest is self-operative, requiring no specific claim for its payment in order for a judge properly to include it in an order or decision. Long Van Le v. Boston Steel & Mfg. Co., 14 Mass. Workers' Comp. Rep. 75, 78 (2000); Charles v. Boston Family Shelter, 11 Mass. Workers' Comp. Rep. 203, 205 (1997). The employee concedes that Russo, supra, prevents an award of interest against the Commonwealth and he makes no argument against its application. (Employee's br. 17.) Consequently, to the extent that the judge's

---

<sup>3</sup> In support of its argument, the self-insurer asserts, “the case did not require any significant effort on the part of either counsel beyond that required to avoid committing malpractice.” (Self-ins. br. 18.) We observe that the self-insurer's counsel's opinion of the effort expended by employee's counsel is irrelevant in light of the judge's power to set an appropriate attorneys fee; nor do we agree that the effort expended by employee's counsel was minimal.

**Russell F. Jones**  
**Board No. 017488-10**

decision may be construed as ordering the payment of § 50 interest,<sup>4</sup> that order is vacated.

Because the employee has prevailed on the self-insurer's appeal, pursuant to § 13A(6), the self-insurer is ordered to pay employee's counsel an attorney's fee in the amount of \$1,563.91.

So ordered.

---

Catherine Watson Koziol  
Administrative Law Judge

---

Mark D. Horan  
Administrative Law Judge

---

William C. Harpin  
Administrative Law Judge

Filed: **June 12, 2013**

---

<sup>4</sup> The judge ordered "[t]hat the Self-Insurer pay *appropriate* interest pursuant to § 50." (Dec. 7; emphasis added.)