COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 031558-05

Terri Pallis	Employee
Armstrong Ambulance Service, Inc.	Employer
Arrow Mutual Liability Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, Costigan and Koziol)
The case was heard by Administrative Judge Rose.

APPEARANCES

Matthew Gendreau, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
John A. Morrissey, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision denying and dismissing her claim for further loss of function benefits pursuant to § 36. The employee also argues that a § 13A(5) fee was due because the insurer failed to withdraw its cross-appeal of the § 10A conference order within five days of the original date set for the hearing.[1] We summarily affirm the decision with respect to the employee's claim for further § 36 benefits, and, for the reasons discussed below, find that no fee is due pursuant to § 13A(5).

The employee claimed § 36 benefits for permanent loss of function of her cervical spine. (Dec. 3.) In his § 10A conference order, the judge awarded the employee $2,352.07 for the claimed loss of function. The parties, dissatisfied with that result, filed cross-appeals. (Dec. 2.) Although the case was scheduled for hearing on January 2, 2008, the insurer requested a continuance due

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

> Whenever an insurer files a complaint or contests a claim for benefits and then . . . accepts the employee's claim or withdraws its own complaint within five days of the date set for a hearing pursuant to section eleven . . . the insurer shall pay a fee to the employee's attorney. . . .

to a scheduling conflict. That unopposed request was allowed on December 5, 2007, almost a month before the original scheduled date, and the hearing was then rescheduled for January 15, 2008. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice of documents in board file). However, following notification that the employee was unable to appear on the rescheduled date, on December 18, 2007, four weeks in advance, the judge notified the parties that the January 15, 2008 event was to be a status conference instead of a hearing.

On January 22, 2008, one week after the status conference, the insurer withdrew its appeal of the conference order. The evidentiary hearing ultimately went forward on on the employee's appeal on April 15, 2008, and in his decision, the judge denied the employee's claim for payment of § 36 benefits related to her cervical spine in excess of those awarded at conference. (Dec. 2, 6.)

In support of her claim that a § 13A(5) hearing fee was due, the employee cites Darling v. RCB Marion Manor, 9 Mass. Workers' Comp. Rep. 313 (1995). In Darling, the board concluded that the "date set for hearing" provided in § 13A(5) meant the first date so scheduled, when "the parties appeared with witnesses prepared and ready to testify." Id. at 315. The board held: "The 'five day' rule would serve little purpose if it did not provide for reimbursement to an employee's attorney who invests the effort and time required to competently and zealously present the client's claim at hearing." Id.[2]

Here, we discern no such investment of effort and time prior to the original hearing scheduled on January 2, 2008. At the insurer's request, but without objection by the employee, the hearing was postponed and rescheduled almost a month in advance.

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[2] The reasoning in Darling contemplated the now long-defunct procedure of bifurcating § 11 hearings into a lay hearing and a so-called "medical hearing," due to the then administrative practice of allowing § 11A impartial examinations to take place *after* the lay testimony had been taken. Darling, supra at 315-316. In O'Brien v. Blue Cross/Blue Shield, 9 Mass. Workers' Comp. Rep. 16 (1995), *aff'd* O'Brien's Case, 424 Mass. 16 (1996), we rejected this practice as a misconstruction of the plain meaning of § 11A, "turning the legislative sequence on its head," and effectively announced the end of the bifurcation method of hearing cases involving impartial medical examinations. The present case obviously involves no such issue of which hearing - "lay" or "medical" - should be deemed "the date set for a hearing" for purposes of § 13A(5).

Likewise, the rescheduled hearing on January 15, 2008 was postponed, four weeks in advance, due to the employee's unavailability. Within a week after that, on January 22, 2008, the insurer withdrew its appeal, almost *three months before the hearing took place* on April 15, 2008. The claim of a § 13A(5) fee is, therefore, without merit.[3]

The decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: June 10, 2009

[3] Because the board's decision in Darling, supra, provided some support, however slender, for the employee's argument that a § 13A(5) fee was due, we decline the insurer's request that § 14 sanctions be levied against employee's counsel for pursuing a frivolous appeal.