COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 03339-91**

Timothy Payton	Employee
Foster Forbes Glass Company	Employer
Home Indemnity Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll & Levine)

APPEARANCES
Mark G. Morisi, Esq., for the employee at hearing and on second appeal
Timothy Payton, pro se, on first appeal
Alec E. Cybulski, Esq., for the insurer

MAZE-ROTHSTEIN, J. This matter is again before us. In Payton v. Foster Forbes Glass Co., 11 Mass. Workers' Comp. Rep. 627 (1997), on appeal by the employee acting pro se, we recommitted the case for a specific finding on the extent of the employee's incapacity after February 7, 1992. The hearing decision following recommittal awarded a closed period of G.L c. 152, § 34, temporary total incapacity benefits, but did not award a fee to the attorney who represented the employee at the original hearing. That attorney now appeals the decision after recommittal arguing that he is owed a hearing fee. For reasons that follow, we agree.

The facts and procedural matters are undisputed. On January 17, 1991, the employee injured his back at work. The insurer accepted the case and paid § 34 total temporary incapacity benefits. A February 2, 1992 conference order reduced those benefits to § 35 temporary partial incapacity benefits. That order was not timely appealed. Instead, a new claim to reinstate § 34 benefits effective February 7, 1992 was filed by the employee's attorney. That claim was denied at conference and was appealed to a hearing de novo. The decision, issued on October 14, 1994, again denied the claim for additional benefits. In addition, it authorized the insurer to discontinue all weekly benefits as of May 19, 1994. (Dec. 1-2; Insurer brief 1-2; Employee brief 1-2.)

The employee and his attorney parted ways after the hearing. (Employee brief 2; Insurer brief 2.) Upon receipt of the hearing decision, the employee filed a pro se appeal. Because it was an error of law to require proof of medical worsening after an unappealed conference order, the reviewing board reversed the denial of compensation in that decision, and recommitted the matter for a determination of the extent of the employee's incapacity on and after February 7, 1992. Payton, supra at 629. The hearing judge, without taking any additional evidence, issued a second decision on July 10, 1998, awarding § 34 benefits from March 13, 1992 through November 30, 1993. The decision made no mention of a fee for the employee's attorney. The attorney now appeals to us arguing that he is entitled to a statutory hearing fee because the employee prevailed in his claim for benefits. We agree.

Pursuant to §13A(5) of the Act, "[w]henever an insurer files a complaint or contests a claim for benefits and . . . (ii) the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney in the amount of three thousand five hundred dollars plus necessary expenses."[1] Further, 452 Code Mass. Regs., § 1.19(4), promulgated pursuant to § 5 of the Act, states that "[i]n 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 . . . ."

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[1] Statute 1991, c. 398, § 103, provides that subsections (1) through (9) and (11) of § 13A of G.L., c. 152 "shall apply to all services performed after the effective date of this Act."

> [However,] § 106 of the aforesaid St. 1991 c. 398, provides that subsection (10) of the aforesaid § 13A [providing for an annual cost of living adjustment] shall be deemed to be substantive in character.
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> [Hence,] when injuries occurred prior to December 23, 1991, but legal services are performed thereafter, attorneys' fees are limited to the amount in § 13A(5), that is, $3500.00.

Hopkins v. Digital Equipment Corp., 13 Mass. Workers' Comp. Rep. 295, 296 n. 2. (1999).

The appellant correctly argues that the threshold criteria of § 13A(5) have been met, namely that the insurer contested the claim and the claimant prevailed at hearing. The insurer does not deny that the claimant employee prevailed at hearing after issuance of the recommittal decision. Rather, it argues that the employee and his attorney severed the representation after the hearing, the employee filed and pursued his appeal pro se and it was this pro se appeal that caused the employee to prevail. We disagree.

It is undisputed that the employee's attorney did not render any services at the appellate level and the attorney is making no claim to any fee associated with the first appeal. But is also true that he did perform services at the hearing and § 13A(5) ties the award of attorneys' fees to services actually performed at hearing without reference to the need for, or outcome of, any appeal to the reviewing board. Furthermore, the decision after recommittal was based solely on the record created at the original hearing when the present attorney represented the employee. The order of recommittal was limited to an assessment of the case absent the error of law in the first decision. Payton, supra at 629. It was not an order for a hearing de novo. See Doherty's Case, 10 Mass. App. Ct. 880, 881 (1988). Under these circumstances, the first decision and the second decision were both the result of one "hearing" for purposes of § 13A(5). G.L. c. 152, § 13A(5). A fee is due to the counsel who represented the employee in that hearing. We, therefore, award the statutory fee of $3500. 00 to the employee's hearing attorney.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: July 24, 2000