COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 002193-05**

Todd Watson	Employee
Rodman Ford Sales	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Koziol)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing and on appeal
James N. Ellis, Esq., for the employee on appeal
George D. Kelly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

HORAN, J. Following our decision ordering recommittal for further findings of fact on the extent of his incapacity,[1] the employee appeals from the second hearing decision in this case. We address one of the issues raised on appeal, and affirm the decision.[2]

Upon receipt of our decision, the judge invited the parties to appear before him. The issue on recommittal concerned the date the judge had used in his first hearing decision to alter the employee's entitlement from § 34 (total) incapacity benefits to § 35 (partial) incapacity benefits.[3] After discussing the case with the parties, the judge informed them he would address it based on "the medical evidence that was available at the time of the original Hearing." (Dec. 2.) The parties agreed the medical evidence admitted at the first hearing would have

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[1] See Watson v. Rodman Ford Sales, 25 Mass. Workers' Comp. Rep. 339 (2011).

[2] We otherwise summarily affirm the decision.

[3] In his first decision, the judge awarded the employee § 34 benefits from January 19, 2005 to May 31, 2007, and § 35 benefits thereafter.

permitted the judge to find the employee's entitlement to § 35 benefits commenced on November 16, 2007. (February 15, 2012, Tr. 4.) In his second hearing decision, the judge changed the date of the commencement of the employee's § 35 benefits from May 31, 2007, to November 16, 2007. (Dec. 5-6.) In so doing, he extended the employee's original entitlement to § 34 benefits during that period. (Dec. 7.) Thus, the employee received a higher amount of compensation benefits in the second decision.

At the end of the second hearing, employee's counsel requested the judge to consider whether "any other fee is due or an enhanced fee."[4] (February 15, 2012, Tr. 9.) In response, the judge ruled that "[t]he insurer shall pay no additional fee to employee's counsel. . . ." (Dec. 7.)

On appeal, the employee argues that because he prevailed in the second hearing decision, he is entitled to a second § 13A(5)[5] hearing fee as a matter of law.[6] We disagree. In Keefe v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 455 (2002), aff'd., Mass. App. Ct., No. 03-J-449, slip. op. (February 10, 2005)(single justice), we reversed a judge's award of a second hearing fee following a decision on recommittal in which the judge "reaffirmed his prior award of § 34 benefits. . . ." Id. We reasoned that:

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[4] Employee's counsel was awarded a hearing fee pursuant to G. L. c. 152, § 13A(5), for prevailing in the first decision, (12/31/09 Dec. 36), and a § 13A(6) fee for prevailing on appeal in Watson, supra.

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

> Whenever an insurer . . . contests a claim for benefits and . . . the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney in an amount equal to three thousand five hundred dollars plus necessary expenses. An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.

[6] The employee does not challenge the judge's decision to decline to award an enhanced attorney's fee "based on the complexity of the dispute or the effort expended. . . ." See footnote 5, supra.

> The statute refers to "a hearing" on "a complaint" or "a claim," for which "a fee" is due. A recommittal is not a new hearing; it is simply a further proceeding on the same hearing arising from a single complaint or claim. Therefore, a new hearing fee is not due. However, with a view toward the last sentence of the statute, the judge may certainly take account of the effort expended by the employee's attorney in the recommittal. Sometimes, that effort can be quite significant. On the other hand, many recommittals are put to rest with little effort.

Id. at 456.

While the facts of this case are distinguishable from those in Keefe, insofar as it can be said the employee achieved an award of additional benefits in the hearing decision post recommittal, we perceive nothing in the statutory scheme which requires the award of a *second* § 13A(5) attorney's fee in the circumstances presented here.[7] Rather, we think the legislature granted judges the discretion to enhance an attorney's fee award in appropriate circumstances. See G. L. c. 152, § 13A(5); Keefe, supra. Here, the judge chose not to exercise his discretion to enhance the § 13A(5) fee previously awarded; and on appeal, the employee advances no argument that the judge's refusal to do so constitutes an abuse of discretion.

Accordingly, we affirm the decision.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Kozio
Administrative Law Judge

Filed: **February 11, 2013**

[7] We note the employee in Keefe also prevailed. See e.g., Conroy's Case, 61 Mass. App. Ct. 268, 276-277 (2004).