

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
INDUSTRIAL ACCIDENTS

BOARD NO. 002734-03

Carlos Lopez
Commercial Cleaning Service, Inc.
Public Service Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Costigan)

The case was heard by Administrative Judge Taub.

APPEARANCES

Michael F. Walsh, Esq., for the employee at hearing
Jacob P. Morris, Esq., for the employee on appeal
Peter M. McElroy, Esq., for the insurer
Elizabeth C. Fliss, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals only the award of an attorney's fee under § 13A(5)¹ in a decision awarding § 35 partial incapacity benefits on the employee's claim for § 34A permanent and total incapacity benefits. We affirm the award of a fee.

As a result of the § 10A conference, the administrative judge ordered the insurer to pay § 34A benefits. The insurer appealed the conference order to an evidentiary hearing. At the hearing, the insurer introduced vocational expert testimony that the employee was capable of earning \$320 per week, an amount that would have resulted in near-discontinuance of weekly benefits, as the employee's average weekly wage was \$350.72. (Dec. 2.) The judge did not adopt that vocational evidence, but also did not find the employee had sustained his burden of proving entitlement to § 34A benefits. Instead, the judge concluded the employee could perform some manner of work, and awarded

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

Whenever an insurer . . . contests a claim for benefits and then . . . the employee prevails at [the § 11] hearing the insurer shall pay a fee to the employee's attorney. . . .

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\$157.82 per week, the employee's maximum benefits obtainable under § 35.² (Dec. 6-7.)
The judge awarded an attorney's fee under § 13A(5) in the amount of \$5,233.64.

The insurer's appeal invites application of the governing departmental regulation and case law construing § 13A(5). 452 Code Mass. Regs. § 1.19(4) provides, in pertinent part:

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

In Connolly's Case, 41 Mass. App. Ct. 35 (1996), the court held an employee is the "prevailing party" if he "succeeds on any significant litigation issue, achieving 'some of the benefit' sought in the controversy." *Id.* at 38, quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978). That Connolly's benefits were reduced was immaterial, because the insurer had appealed the conference order, thereby placing all benefit entitlement in jeopardy. See Connolly's Case, *supra*; Conroy's Case, 61 Mass. App. Ct. 268, 273-275 (2004); Cruz's Case, 51 Mass. App. Ct. 26, 28 (2001).

² General Laws c. 152 § 35, provides, in pertinent part:

While the incapacity for work resulting from the injury is partial, during each week of incapacity the insurer shall pay the injured employee a weekly compensation equal to sixty percent of the difference between his or her average weekly wage before the injury and the weekly wage he or she is capable of earning after the injury, but not more than seventy-five percent of what such employee would receive if he or she were eligible for total incapacity benefits under section thirty-four.

The judge, however, did not find the employee was capable of earning any amount. He wrote:

Mr. Lopez has proven that he has a real disability and I find that he is at least partially incapacitated from the earning of his pre-injury wage. As I find him partially incapacitated, but am unable to find him to have an earning capacity, I find him entitled to receive his maximum level of § 35 partial incapacity benefits.

(Dec. 5-6)

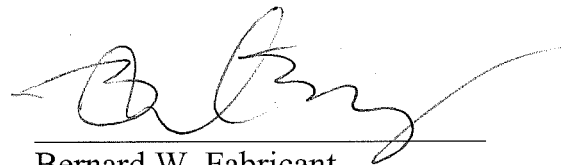
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In Giunta v. Unifirst Corp., 22 Mass. Workers' Comp. Rep. 137 (2008), both parties appealed the conference order, and the judge reduced the employee's § 35 benefits in his hearing decision. Looking to the insurer's appeal of the conference order as the operative factor, and applying rule § 1.19(4), we held: "[W]here the benefits awarded at conference are placed in jeopardy by the insurer's appeal, the employee prevails when he retains some of them." Id. at 140. We thus concluded that the employee "prevailed on a significant litigation issue." Id.

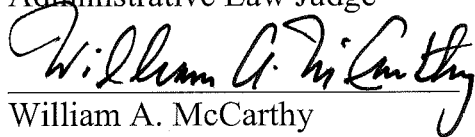
In the present case, the employee successfully fended off the insurer's attempt to establish a high earning capacity through its vocational expert. As such, the employee's retention of § 35 benefits, in the face of the insurer's appeal of the § 34A conference award, is on even stronger ground than the cases in which the insurer merely appeals, and does not introduce evidence in support of its position. See Badea v. Hasbro, Inc., 22 Mass. Workers' Comp. Rep. 73, 75-76 (2008)(non-appealing insurer raised issue of entitlement to benefits after allegedly intervening motor vehicle accident; § 13A(5) fee due for prevailing against that affirmative defense). Accord Richard's Case, 62 Mass. App. Ct. 701 (2004)(fee due for successful defense against insurer's § 14 fraud complaint). The judge's award of a § 13A(5) fee is affirmed.

Pursuant to § 13A(6), the insurer shall pay employee's counsel a fee in the amount of \$1,497.28 for prevailing on this appeal.

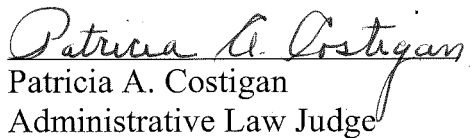
So ordered.



Bernard W. Fabricant
Administrative Law Judge



William A. McCarthy
Administrative Law Judge



Patricia A. Costigan
Administrative Law Judge

Filed:

