COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 010624-06

Antonio Sierra	Employee
SMJ Metals, Inc.	Employer
Hartford Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Horan and Fabricant)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Charles E. Miracle, Esq., for the insurer

LEVINE, J. The employee appeals from a decision in which the administrative judge denied his claim for an illegal discontinuance penalty under § 8(5). The employee alleges that the insurer improperly terminated benefits based on the employee's incarceration pursuant to conviction. See G. L. c. 152, § 8(2)(j) (unilateral discontinuance allowed where "the employee has been incarcerated pursuant to conviction for a felony or misdemeanor and has thereby forfeited any right to compensation during such period"). The employee contends that the Superior Court's guilty finding pursuant to his plea did not constitute a conviction, which, he argues, only entered months later when he was sentenced to time served. The employee also argues that the judge erred by sua sponte imposing § 14 penalties for bringing the claim without reasonable grounds. We affirm the denial of the claim, but reverse the § 14 penalty.

The employee sustained an industrial injury on March 23, 2006. The insurer paid § 34 benefits commencing on January 1, 2007. On December 7, 2007, the employee was arrested and, in lieu of payment of bail, was held pending trial. On September 3, 2009, the employee pled guilty in Superior Court to five of the six

charges against him; at that time, findings on the guilty plea were entered on the docket. On September 16, 2009, the insurer unilaterally discontinued payment of § 34 benefits. The employee continued to be incarcerated until April 16, 2010, when he was sentenced to time served. (Dec. 2, 5; Ins. Ex. 1.)

The issue before us is whether the employee's September 3, 2009 guilty plea, and the court's acceptance and finding thereof at that time, constituted a "conviction" for the purposes of § 8(2)(j), even though sentence was not entered on the docket until April 16, 2010. We agree with the administrative judge that they do constitute a conviction.

The courts of the Commonwealth have spoken on the nature and characteristics of a conviction stemming from a guilty plea: "A plea of guilty is an admission of the facts charged and 'is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. . . . When one so pleads he may be held bound.' " Kuklis v. Commonwealth, 361 Mass. 302, 305 (1972), quoting Kercheval v. United States, 274 U. S. 220, 223-224 (1927). "A guilty plea, once accepted, leads to a final judgment of conviction; like a verdict of guilty, it is conclusive." Commonwealth v. Cabrera, 449 Mass. 825, 830 (2007). "Under Massachusetts law, a 'conviction' is an adjudication of guilt either by way of the entry of a formal guilty plea or an admission to sufficient facts or after a finding of guilt by jury verdict." Commonwealth v. Gomes, 419 Mass. 630, 632 (1995), quoting United States v. Hines, 802 F.Supp. 559, 571 (D.Mass. 1992). "Unlike a sentence, a finding of guilt, once entered, is 'final and irrevocable except through appeal or motion for a new trial.' " Commonwealth v. McCulloch, 450 Mass. 483, 488 (2008), quoting Gomes, supra.

In the present case, the Superior Court judge found the employee guilty on five counts, as reflected in the court's docket entry of September 3, 2009. (Ins. Ex. 1.) After noting that the employee's bail was revoked, the docket entry states, "Continued to 4/16/2010 at 9:00 a.m. for sentencing." Id. Absent convictions on the five charges, certainly no sentencing would have been scheduled. Thus, the judge correctly

concluded that the insurer properly discontinued payment of benefits, based on the September 3, 2009 guilty findings.

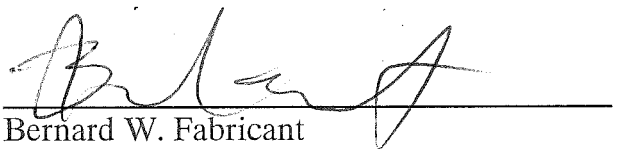
We do note "that a *judgment* of conviction does not enter unless sentence is imposed . . . ." Commonwealth v. Simmons, 448 Mass. 687, 688 n.2 (2007)(emphasis added); see also Forcier v. Hopkins, 329 Mass. 668, 671 (1953)("In a criminal case the sentence is the judgment"). However, we do not take this to mean that the employee's status as "incarcerated pursuant to conviction" under § 8(2)(j) should be defined only by the formal entry of judgment of conviction. The Legislature is presumed to be aware of the subtleties of the criminal law, cf. Commonwealth v. Marzilli, 457 Mass. 64, 68 (2010), and its reference in § 8(2)(j) to "conviction," rather than "judgment of conviction," carries with it the broader application of the term. " 'Had the [L]egislature intended the . . . statute to have a more narrow application, . . . it was certainly capable of drafting the statute accordingly.' " Harvard 45 Assoc., LLC v. Allied Props. and Mortgages, Inc., 80 Mass. App. Ct. 203, 208-209 (2011), quoting In re Forest St., LLC, 404 B.R. 6, 10 (Bankr.D.Mass. 2009).

We therefore affirm the denial of the employee's claim for an illegal discontinuance penalty under § 8(5).

Nonetheless, in light of the legal distinction described above, the employee's challenge to the applicability of § 8(2)(j) was not frivolous. Accordingly, we reverse the imposition of a penalty under § 14(1)(b).

So ordered.

Frederick E. Levine
Administrative Law Judge



Bernard W. Fabricant
Administrative Law Judge

HORAN, J., (concurring). All of the employee's claims at hearing[1] derived from his contention that the insurer's discontinuance of his benefits on September 16, 2009, violated § 8(5). (Dec. 1-2.)[2] That section provides, in pertinent part:

> if the insurer terminates . . . or fails to make any payments required under this chapter, and additional compensation is later ordered, the employee shall be paid by the insurer a penalty equal to twenty per cent of the additional compensation due on the date of such finding.

Thus, in order to succeed on his illegal discontinuance claim, at hearing the employee was required to prove that he was entitled to receive § 34 benefits from September 16, 2009, until January 1, 2010.[3] If any additional benefits were ordered as a result of his claim, he would then be entitled to a twenty percent penalty on the back amount "due on the date of such finding." G. L. c. 152, § 8(5); DaSilva v. Palladino Landscaping, 25 Mass. Workers' Comp. Rep. 259 (August 8, 2011)(no penalty due unless additional compensation ordered by judge at conference or hearing).

When the parties appeared at hearing on December 1, 2010, the issue of when the employee was convicted[4] was moot, because by then it was undeniable that he had been incarcerated pursuant to a conviction from December 7, 2007 to April 16, 2010. (Dec. 2; Employee br. 3-5 and Ins. br. 2.) Thus, when the employee appeared at hearing, it was impossible for him to prove any entitlement to benefits from September 16, 2009 to January 1, 2010. See n.2, supra. Section 8(2)(j) makes this perfectly clear: by virtue of his incarceration pursuant to his conviction, the employee "forfeited any right to compensation during" that period of time. Therefore, as a

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[1] The employee claimed § 34 benefits from September 16, 2009 through January 1, 2010, penalties under §§ 8(5), 14(1) and 14(2), § 50 interest and a § 13A attorney's fee. (Dec. 1.)

[2] There is an obvious typographical error on page two of the decision. The parties stipulated that the insurer unilaterally discontinued the employee's compensation on September 16, 2009, not, as the decision states, on September 16, 2007.

[3] The parties stipulated the employee's entitlement to § 34 benefits "would have expired on or about January 1, 2010." (Dec. 2.)

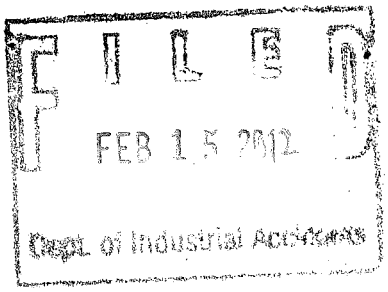
[4] The operative dates were either September 3, 2009 or April 16, 2010.

matter of law, the judge could not have ordered *any* compensation for the time period in question, and no penalty under § 8(5) could apply. DaSilva, supra. Accordingly, I concur with the majority's opinion that the insurer did not violate § 8(5) by failing to make payments to the employee during the period in question.[5]

On appeal, the employee also challenges the propriety of the judge's imposition of a § 14(1) penalty. That issue is also moot, because the judge did not quantify the penalty, and the insurer has not appealed his failure to do so.[6] Accordingly, the insurer waived its right to pursue enforcement of the penalty.

Mark D. Horan
Administrative Law Judge

Filed:



[5] The issue decided by the majority concerning the operative date of the employee's conviction for § 8(2)(j) purposes was properly before the judge at the time of the conference. However, as of April 16, 2010, the employee no longer had a reasonable basis to pursue his illegal discontinuance claim, and therefore had no right to a hearing on that claim on December 1, 2010.

[6] Upon receipt of the decision, the insurer did not ask the judge to determine the amount of the § 14(1) penalty. See Sheppard v. River Valley Fitness On, L.P., 428 F.3d 1, 13 (1st Cir. 2005)(failure to object timely to amount of attorneys fees awarded as sanction deemed waiver of issue). Nor did the insurer appeal the hearing decision and request an order of recommittal for further findings on the amount due. The insurer's failure to preserve the issue of the amount of the § 14(1) penalty due constitutes waiver. Without a finding on the amount of the penalty due there is, in effect, nothing to enforce. See General Laws c. 152, § 12. This situation is not analogous to the insurer's right to commence an independent action to recoup benefits, following a decision evincing an overpayment of same, to determine the amount of any recoupment due. The act explicitly grants insurers the option to file "a complaint pursuant to section ten or by bringing an action against the employee in superior court." See General Laws c. 152, § 11D(3).