COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025727-97**

Bobbi Pacellini	Employee
Cape Cod Fireplace Shop	Employer
Wausau Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Maze-Rothstein)

APPEARANCES
John F. Trefethen, Jr., Esq., for the employee
Andrew P. Saltis, Esq., for the insurer

COSTIGAN, J. The insurer appeals from a decision in which an administrative judge ordered it to pay a $10,000 penalty, pursuant to G. L. c. 152, § 8(1),[1] because it had not reimbursed the employee her $175 share of the fee required by § 11A(2).[2]

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[1] General Laws Chapter 152, § 8(1), as amended by St. 1991, c. 398, §§ 23 to 25, provides in pertinent part:

> Any failure of any insurer to make all payments due an employee under the terms of an order, decision, arbitrator's decision, approved lump sum or other agreement . . . within fourteen days of the insurer's receipt of such document, shall result in a penalty of two hundred dollars, payable to the employee to whom such payments were required to be paid by the said document; provided, however, that such penalty shall be one thousand dollars if all such payments have not been made within forty-five days, two thousand five hundred dollars if not made within sixty days, and ten thousand dollars if not made within ninety days.

[2] General Laws Chapter 152, § 11A(2), as amended by St. 1991, c. 398, § 30, provides:

> When any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order pursuant to section ten A . . . [the party] who files such appeal shall also submit a fee equal to the average weekly wage in the commonwealth at the time of the appeal to defray the cost of the medical examination under this section within ten days of filing said appeal; provided, however, that where more than one party appeals, the fee shall be divided equally among all appealing parties; provided, further, that such amount paid by a claimant shall be refunded by the insurer to any claimant who prevails at the hearing.

The merits of the employee's underlying claim were tried before a different administrative judge.[3] The only matter tried in the instant case was the employee's claim for a § 8(1) penalty, and the sole issue before us on appeal is the propriety of the judge's award of that penalty. Therefore, we set forth only the relevant procedural facts.

The employee filed a claim for a penalty under § 8(1) based on the insurer's alleged failure to reimburse her the one-half share of the § 11A(2) impartial medical examination fee. On March 1, 2001, a conference on that claim was held pursuant to § 10A. On May 12, 2001, the administrative judge filed an order requiring the insurer to pay the employee a $10,000 penalty. The judge, however, stayed the order pending appeal.[4] At hearing, the parties stipulated, and the judge found, that:

> 1. Much of the § 8(1) penalty claim regarding the Employee's average weekly wage has been settled. The Employee's claim for penalties is confined to the Insurer's failure to pay the $175.00 appeal fee associated with the § 11A examination. . . .
> 2. Subsequent to March 7, 2001, the Insurer issued a check to Ms. Pacellini in the amount of $175.00. Payment on that check was

[3] The employee sustained a work-related injury on July 2, 1997. At that time, she had concurrent employment. Wausau was the insurer for the employer at the location of the actual work accident. Travelers was the insurer for the other employer. Pursuant to a § 10A conference order filed on June 25, 1998, Wausau was ordered to pay the employee § 34 temporary total incapacity benefits. Both the employee and Wausau appealed from that order. A second conference order, filed on July 28, 1998, denied the employee's claim for benefits against the other insurer, Travelers. The employee appealed from that order. Both claims were litigated at a hearing de novo. In the original hearing decision, filed on May 25, 2000, Wausau was found liable for the employee's work injury and ordered to pay ongoing § 34 benefits and medical benefits. That decision was not appealed.

[4] It has come to our attention, through this case and others, that some administrative judges have implemented a practice of staying conference orders pending appeal. Such a practice is neither explicitly nor implicitly authorized by Chapter 152. Moreover, such a practice is in direct conflict with the provisions of § 12, which state that all orders and decisions of the board or reviewing board shall be enforced "notwithstanding whether the matters at issue have been appealed and a decision on the merits of the appeal is pending." Cf. O'Brien's Case, 424 Mass. 16, 18 (1996)(reviewing board temporarily stayed its recommittal to enable an appeal to address the constitutionality of G. L. c. 152, § 11A). We need not speculate on a judge's purpose or reason for staying a conference order. The practice is impermissible under the statute.

> stopped by the Insurer because the Insurer contended the check was made to the Employee in error. Later, a check in the amount of $175.00 was sent to the Employee's attorney.

(Dec. 2-3.) In addition to these stipulations, the parties also submitted an "Agreed Statement of Facts," which reads as follows:

1. On June 25, 1998, Administrative Judge William Constantino issued a Conference Order.
2. On June 30, 1998, the Insurer appealed the Conference order and paid the appeal fee of $350.00.
3. On July 1, 1998, the Employee appealed the Conference Order.
4. On July 1, 1998, the Employee's then Attorney, James N. Ellis, wrote the Employee a letter (see Exhibit "A").
5. On July 7, 1998, the Employee forwarded a check drawn on her account in the amount of $175.00 made payable to James N. Ellis & Associates, P.C. (see Exhibit "B").
6. On August 13, 1998, the Employee's then Attorney, James N. Ellis & Associates, P.C., mailed a check to the Insurer's then Attorney, Donald Culgin, in the amount of $175.00. The check was drawn upon the account of "Mass. IOLTA Committee Account by James N. Ellis, Sr. & Associates, P.C." (see Exhibit "C").
7. Administrative Judge Constantino issued a Hearing Decision, dated May 25, 2000 (see Exhibit "D").
8. On June 13, 2000, the Insurer appealed the Hearing Decision to The Reviewing Board.
9. On July 19, 2000, the Employee's Attorney, John F. Trefethen, Jr., wrote to the adjuster and requested that the Employee be reimbursed the $175.00 appeal fee (see Exhibit "E").
10. On August 24, 2000,[5] the Employee filed a Claim for Section 8(1) penalty (see Exhibit "F").
11. On October 19, 2000, The Reviewing Board allowed the Insurer to withdraw its appeal.
12. As of the date of the Conference, March 7, 2001, the Insurer had not made reimbursement of the $175.00 appeal fee and more than ninety (90) days has [sic] passed since the Insurer's receipt of the Hearing Decision.

(Ex. 9.) Based on these stipulations and agreed facts, the administrative judge stated:

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[5] August 23, 2000 was the ninetieth day following the filing date of the hearing decision. Thus, on August 24, 2000, the § 8(1) penalty claimed by the employee increased from $2,500 to $10,000.

> I find that the Employee paid $175.00 as half of the [§] 11A examination fee and that $175.00 was due to the Employee. Moreover, I find that the Insurer was required to make any payment due, directly to the Employee . . . Having determined that the Insurer was obligated to make the $175.00 payment due, directly to the Employee, the sole question remaining is whether the Employee is entitled to a penalty assessment under Chapter 152 Section 8(1). The Employee was the prevailing party under the May 25, 2000 decision. As the prevailing party under the decision, the reimbursement provision of Section 11A applies. The Insurer has failed to reimburse the Employee the $175.00 she expended for the [§] 11A fee. The Insurer has failed to make all payments due under the terms of the May 25, 2000 decision. Because more than 90 days have elapsed from the date of the decision, the Employee is entitled to receive $10,000.00 from the Insurer as a penalty.

(Dec. 4.) The judge also awarded a legal fee to the employee's attorney. (Dec. 5.)

On appeal, the insurer advances three arguments against the $10,000 penalty award. First, it contends that reimbursement of the $175 fee was not a payment "due an employee" under § 8(1) but rather was a "necessary expense," reimbursable to the employee's attorney, and therefore not subject to § 8(1) penalties. (Insurer's brief 3, 4.) We agree with the insurer that late payment of attorney's fees and necessary expenses awarded in a conference order or hearing decision does not subject an insurer to § 8(1) penalties because they are not "payments due an employee." Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528 (1996); Ngo v. Jeffco Fibres, Inc., 10 Mass. Workers' Comp. Rep. 286 (1996), aff'd, Ngo's Case, 12 Mass. App. Ct. 1108 (1997). We do not, however, agree that the award of "necessary expenses" to the employee's attorney in this case included the $175 appeal fee. This is because 452 Code Mass. Regs. § 1.02 specifically excludes the fee from the definition of "Necessary Expenses."[6]

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[6] 452 Code Mass. Regs. § 1.02, defines "necessary expenses," as used in G. L. c. 152, § 13A, as:

> [A]ll reasonable out-of-pocket costs, as the Department may set, to a claimant's attorney incurred by said attorney in prosecuting a claim for benefits or contesting a complaint filed by the insurer, including the cost of obtaining relevant medical records, doctor's reports, private investigator fees, constable charges, expert witness charges, interpreter fees and scientific testing costs, but specifically excluding telephone expenses, parking fees, postage, stationery, photocopies, meals, automobile expenses, and ordinary legal office overhead. *Filing fees and impartial physician deposition costs required by*

The insurer next argues that the judge erred in finding that because the $175 check forwarded to its then attorney was drawn on an IOLTA account, the insurer's attorney "was on notice that the fee was not out of the [employee's] attorney's fund but rather that the money came from client funds." (Dec. 4.) The insurer asserts that there is no requirement that claims departments of insurance companies understand the workings or purpose of an "Interest on Lawyers' Trust Account" (IOLTA).[7] (Insurer's brief 8.) Suffice it to say that § 8(1) does not invite speculation, not even in the guise of judicial notice, as to what an insurance company, or even its lawyer, knows or should know. Contrary to the employee's argument and the administrative judge's finding,

> [Section] 8(1) does not apply to *all payments due*. Rather, it applies to "all payments due an employee under the terms of an order, decision, arbitrator's decision, approved lump sum or other agreement, or certified letter notifying said insurer that the employee has left work after an unsuccessful attempt to return. . . ." G. L. c. 152, § 8(1), as amended by St. 1991, c. 398, § 23. The insurer is required to pay within fourteen days of its "receipt of such document." Id.

Eastern Cas. Ins. Co. v. Roberts, 52 Mass. App. Ct. 619, 630 (2001) (emphasis in original). Thus, the only issue presented by the employee's § 8(1) penalty claim, and by this appeal, is whether the *terms* of the May 25, 2000 hearing decision, (Ex. 5), required the insurer to pay to the employee the $175 payment it had received as her half-share of

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> *M. G. L. c. 152, § 11A, which are paid by claimant's counsel, shall not be submitted as necessary expenses but shall be reimbursable directly from the insurer against whom the claimant prevails at hearing*.

(Emphasis added.) Our dissenting colleague views this regulation as "establishing the refunding of the fee as a primary obligation on the part of the insurer, without the necessity of line item order or request." Insofar as the regulation addresses payment of the filing fee by claimant's *counsel*, not the claimant, the obligation it imposes on the insurer is to reimburse claimant's counsel, not the claimant. An insurer's failure to timely tender such reimbursement does not trigger a § 8(1) penalty. See Diaz, supra.

[7] Rule 1.15 of the Massachusetts Rules of Professional Conduct requires that all lawyers who hold client funds must deposit such funds in one of two varieties of interest bearing accounts: 1) a pooled account ("IOLTA") for all client funds that are nominal in amount or held for a short time frame, or 2) an individual account with interest paid as directed by the client. The IOLTA committee, established by the Supreme Judicial Court, requires yearly reporting regarding these accounts when attorneys annually renew their bar registration.

the § 11A (2) fee to defray the cost of the impartial medical examination. Therefore, we look to the terms of that decision.

In the original decision, the administrative judge ordered the insurer to make the following payments:

1. That the insurer Wausau pay § 34 benefits based upon an average weekly wage of $707.68 from November 1, 1998 to date and continuing at a compensation rate of $424.68.
2. That the insurer Wausau pays [sic] reasonable and related medical expenses under Section 13 & 30 for the diagnosed condition.
3. That the Insurer Wausau credit itself with any benefits paid.
4. That the Employee's Rights under Section 36 are hereby reserved.
5. That the Insurer Wausau pay a legal fee to the Employee's Counsel in the amount of $4,663.90, plus necessary expenses pursuant to M.G.L. c. 152, Section 13A(5). I have increased the attorney fee due to the effort expended and the complexity.

(Ex. 5, 13-14.) No fair reading of these terms, the only payments awarded in the decision, permits the conclusion, reached by the judge, that within fourteen days of its receipt of "such document," G. L. c. 152, § 8(1), the insurer was required to pay $175 to the employee for her half-share of the § 11A(2) fee. The administrative judge implicitly acknowledged that fact by looking beyond the four corners of the decision to other documents to invoke § 8(1) against the insurer. The reviewing board has said this is impermissible:

> Here, § 8(1) explicitly designates the documents which, if not complied with, trigger a penalty. A letter from OEVR confirming to the insurer that the reduction in benefits is no longer in effect is not among them. The employee seems to argue that such a letter is an "order" or "decision" within the meaning of § 8(1). However, those terms have specific meanings within Chapter 152. An "order" refers to an administrative judge's written determination awarding, denying or modifying weekly compensation or other benefits following a conference under § 10A. A "decision" refers to an administrative judge's written decision following a hearing pursuant to § 11, or a decision of the reviewing board pursuant to § 11C. See also § 12 . . . [W]e cannot agree with the employee that a written determination by OEVR that the employee is once more entitled to full benefits is one of the documents which, if not complied with, triggers a § 8(1) penalty.

Montleon v. Massachusetts Dep't. of Pub. Works, 16 Mass. Workers' Comp. Rep. 354, 358-359 (2002). If a written confirmation from the department's Office of Education and Vocational Rehabilitation to an insurer, that its previously authorized 15% reduction of an employee's weekly incapacity benefit is no longer effective, does not trigger a § 8(1) penalty when the insurer fails to increase the benefit in a timely fashion, letters from an employee's counsel to the insurer about a § 11A(2) filing fee, the first sent twenty-three months before the original hearing decision, (Ex. 3; Ex. 9, para. 6), and the second sent fifty-five days after, (Ex. 6; Ex. 9, para. 9), cannot do so.

Compounding that error, the judge strayed beyond the non-decision documents to impute to the insurer's attorney,[8] and thereby to the insurer, knowledge of the workings of an IOLTA account: that a check issued to the insurer on the "Mass. IOLTA Committee Account by James N. Ellis, Sr. & Associates, P.C.," (Ex. 4), which was signed by someone other than the employee (assumedly an authorized representative of the law firm) and mailed to insurer's counsel, not by the employee but by her attorney, was actually the employee's money.[9] Not only is this conclusion far afield from the actual terms of the hearing decision, but it is so far-fetched as to be capricious, given that punitive statutes, such as § 8(1), must be narrowly applied. Emde v. Chapman Waterproofing Co., 12 Mass. Workers' Comp. Rep. 238, 244 (1998), citing Collatos v. Boston Retirement Bd., 396 Mass. 684 (1986). "It is an ancient rule . . . that in order to charge a party with a penalty, he must be brought within its operation, as manifested by

[8] The insurer's attorney to whom employee's counsel sent a letter enclosing the $175 check drawn on his firm's IOLTA account, (Exs. 2 and 3), was not the attorney who represented the insurer at the original hearing in 1999, (Ex. 5); and it was a third attorney who represented the insurer in the § 8(1) penalty claim litigation. (Dec. 1.)

[9] The employee does not contend that a copy of her attorney's letter to her, requesting her to pay $175 to his firm, (Ex. 1), and/or a copy of her $175 check, payable to the law firm, (Ex. 2), were ever presented to the insurer prior to the litigation on her § 8(1) penalty claim.

express words or necessary implication." Id. at 686-687. Thus, penalty provisions must be strictly construed. DeLano v. Milstein, 56 Mass. App. Ct. 923 (2002).[10]

Moreover, the letter sent by the employee's attorney to the insurer's adjuster fifty-five days after the hearing decision issued, (Ex. 6; Ex. 9, para. 9), has no bearing on the issue at hand. Letters from attorneys are not § 8(1) documents, and no statutory obligations can arise from the insurer's receipt thereof.[11] Consideration of this document is contrary to law, as the only relevant inquiries are whether, *by the terms of the hearing decision*, the insurer was obliged to reimburse the $175 § 11A filing fee and, if so, whether the insurer necessarily knew *from the decision* that such reimbursement was to be paid directly to the employee. Because we answer both questions in the negative, we reverse the § 8(1) penalty award.

Unable to point to any term of the original decision as requiring payment of the $175 fee, the administrative judge found, and the dissent agrees, that because the employee prevailed at the hearing, the decision "triggered" the filing fee reimbursement provisions of § 11A(2) for purposes of § 8(1). Such piggy-backing is improper, given the strict construction to be accorded the penalty provision. DeLano, supra. Moreover, the very language of § 11A(2) imposes two prerequisites to an insurer's obligation to refund the filing fee to a claimant: 1) the claimant must have prevailed at hearing; and 2) the claimant must have paid the filing fee. Contrary to the dissent's argument, neither prerequisite is always automatically satisfied, rendering the fee refund provision of § 11A(2) "self-operative."

Although in this case the fact that the employee prevailed in the original hearing is not disputed, (Dec. 4), such is not always the case. A prevailing party is "one who succeeds on any significant litigation issue, achieving 'some of the benefit' sought in the

[10] That often, as in this case, the $10,000 penalty under § 8(1) "far exceeds any genuine loss incurred by the claimant as a result of late payment," Eastern Cas. Ins. Co., supra at 627, is another compelling reason why the statute must be strictly construed.

[11] The only limited exception is a certified letter informing the insurer of an employee's unsuccessful attempt to return to work, see § 8(2)(a), which is clearly not the nature of the letters in this case.

controversy." Connolly's Case, 41 Mass. App. Ct. 35, 38 (1996), citing Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978). One need look no further than the many decisions filed by this board and the appellate courts, addressing the issue of whether an employee "prevailed" for purposes of § 13A attorneys' fees, to appreciate that the "prevail" provision of § 11A(2) is not automatically satisfied. See Cruz's Case, 51 Mass. App. Ct. 26, 29 (2001) (where insurer sought discontinuance of weekly incapacity benefits and hearing decision reduced, but did not discontinue, such benefits, employee prevailed for purposes of § 13A(5) attorney's fee); Supris v. Fernald Dev. Ctr., 14 Mass. Workers' Comp. Rep. 412, 415 (2000) (where self-insurer's appeal of conference order placed all of employee's benefits in jeopardy, hearing award of some benefits was equivalent of prevailing for purposes of attorney's fee); Harney v. Goretti's Supermarket, 12 Mass. Workers' Comp. Rep. 157, 159-161 (1998) (where insurer disputed employee's § 34A claim in toto and hearing decision awarded employee § 35 benefits, employee received some of the benefit sought and prevailed for purposes of a § 13A(5) attorney's fee); compare Gonzalez's Case, 41 Mass. App. Ct. 39, 41-42 (1996) (employee who proved industrial injury did not prevail for purposes of § 13A(3) legal fee when judge awarded no compensation); Mueller's Case, 48 Mass. App. Ct. 910 (1999) (employee who partially successfully defended against insurer's recoupment claim did not prevail for purposes of § 13A(5) when judge awarded no compensation); Francis v. Sheraton Tara Hotel, 10 Mass. Workers' Comp. Rep. 161, 164 (1996) (where incapacity benefits awarded at conference were discontinued retroactively in hearing decision, and no medical benefits were awarded, employee did not prevail and no legal fee was due); Marino v. M.B.T.A., 7 Mass. Workers' Comp. Rep. 140, 142 (1993) (where only employee appealed from conference denial of his claim, only attorney's fee due was payable by employee under § 13A(9), even though benefits awarded in hearing decision). These cases, and many more, amply illustrate that whether an employee prevails in a hearing decision is not self-evident, "no questions asked." For this reason alone, we disagree with the judge and the dissent that the fee refund provision of § 11A(2) is self-operative.

Moreover, even if an employee prevails at hearing, the mere fact that she appealed the § 10A conference order does not prove that she paid the § 11A(2) filing fee:

> Where the appointment of an impartial medical examiner is required, a party has up to ten calendar days following the filing of the appeal *to pay the Department* the requisite fee. *A request for waiver of the requisite fee based on indigence* shall be filed with the commissioner on a form prescribed by the Department not later than ten calendar days following the filing of the appeal. *Where more than one party files an appeal, each shall file timely either the requisite fee or request a waiver on the prescribed form. The Department shall designate the first check received as the requisite fee required to schedule an examination by an impartial physician. All other checks will be returned.*

452 Code Mass. Regs. § 1.11(1)(a). (Emphasis added.)[12] Because the fee otherwise required of an employee may be waived based on indigence, we disagree with the dissent that when an employee prevails in a hearing decision, § 11A(2) obliges the insurer to refund the appeal fee, "no questions asked."

As to the second prerequisite of § 11A(2) -- payment of the fee *by the claimant* -- we reject the dissent's contention that such requirement is satisfied, regardless of who (i.e., the employee or her attorney) paid the fee. We do not think that "the law of agency" trumps the strict construction to be accorded penalty statutes such as § 8(1). Certainly the myriad of non-decision documents offered into evidence at the penalty hearing supports our conclusion that the "terms" of the hearing decision did not implicitly, or by operation of statute, require the insurer to refund $175 to the employee. Precisely because at least two prerequisites must be established – that the claimant prevailed and that the claimant

[12] There is nothing in the administrative judge's decision or in the evidentiary record which establishes that the employee paid the full $350 fee to the department, thereby perfecting her appeal of the Wausau conference order. The decision and the record (see footnote 3, supra) establish only that a) on June 30, 1998, Wausau appealed the conference order against it and paid the $350 appeal fee; b) on July 1, 1998, the employee appealed the Wausau conference order; c) on July 7, 1998, the employee forwarded her check in the amount of $175 to her then attorney; and d) on August 13, 1998, the employee's then attorney mailed a $175 check, drawn on his Massachusetts IOLTA account, to the insurer's then attorney. (Ex. 9.) Absent payment to the department of the full $350 appeal fee, followed by the department's return of the employee's appeal fee check because the insurer's check had been received first, the employee had not perfected her appeal of the § 10A conference order. Neither insurer, however, raised this issue at the original hearing and, therefore, we deem it waived.

paid the § 11A(2) fee -- the dissent's analogy between what we have held to be the self-operative interest provisions of § 50, and the fee refund provisions of § 11A(2), is untenable.

We note that in Favata v. Atlas Oil Corp., 12 Mass. Workers' Comp. Rep. 12 (1998), cited by the dissent for the proposition that the "self-operative" nature of § 50 invites a § 8(1) penalty when interest is not timely paid, the insurer's culpable omission was failure to pay interest *explicitly awarded* in a § 10A conference order of weekly compensation. No self-operation of the statute was involved as the "terms" of the order required payment of interest. The reviewing board reversed the administrative judge's denial of the penalty, holding that § 50 interest is a "payment due the employee" under § 8(1). Citing Diaz, supra at 533, the board stated that "[t]he language of § 8(1), 'payments due the employee,' means what it says: *amounts that are required by an order, decision, etc., to be paid directly to the employee.*" Favata, supra at 14 (emphasis added).

The dissent's citation of Taylor v. Morton Hosp. & Med. Ctr., Inc., 16 Mass. Workers' Comp. Rep. 30 (1998), is likewise off the mark. The reviewing board's decision does not reflect whether § 50 interest was explicitly awarded by conference order, only that at hearing, the insurer did not dispute that interest was due on the benefits awarded at conference, nor did it argue that it had made timely payment of the interest. Id. at 37. The insurer's sole defense to the employee's penalty claim was that she did not comply with the procedural requirements for filing a § 8(1) penalty claim, set forth in 452 Code Mass. Regs. § 1.07(2)(b).[13] Because the insurer had not raised that argument at hearing, the board deemed the issue waived and found the insurer subject to penalties under § 8(1) as a matter of law. Taylor, supra at 38.

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[13] That adjudicatory rule provides:

> Claims for penalties under M. G. L. Ch. 152, Section 8(1), shall be accompanied by a copy of the Order, Decision, Arbitrator's Decision, approved lump sum or other agreement or other relevant documents(s) with which it is alleged the insurer has failed to comply, together with an affidavit signed by the claimant or claimant's attorney attesting to the date payment was due, the date, if any, on which payment was made, and the amount of penalty the claimant is owed.

The third decision cited by the dissent, Drumm v. Viale Florist, 16 Mass. Workers' Comp. Rep. 335 (2002), simply reiterated that § 50 is self-operative. The board held that an administrative judge erred in denying, as untimely, an employee's claim for § 50 interest. "Because § 50 is self-operative, Le v. Boston Steel & Mfg. Co., 14 Mass. Workers' Comp. Rep. 75 (2000), [it] should be construed in such a way as to effectuate its plain meaning, Sullivan v. Town of Brookline, 435 Mass. 353, 360 (2001). . . ." Drumm, supra at 337. We have said:

> Interest under § 50 provides a remedy to the employee for the loss of use of monies later found due him. 'The payment of interest is mandatory and earned, even though not expressly asked for by the employee at hearing or specifically ordered to be paid by the terms of the decision, and does not permit of discretion in the administrative judge or the reviewing board.' (citation omitted).

Arbogast v. McCord-Winn, Inc., 5 Mass. Workers' Comp. Rep. 189, 198 (1991).

Lastly, the two statutes which the judge and the dissent equate differ in a significant respect. Section 50 provides:

> Whenever payments of any kind are not made within sixty days of being claimed by an employee . . . and *an order or decision requires that such payments be made*, *interest* at the rate of ten percent per annum of all sums due from the date of receipt of the notice of the claim by the department to the date of payment *shall be required by such order or decision. . . .*

G. L. c. 152, § 50, as amended by St. 1991, c. 398, § 77. (Emphasis added.) Section 50 requires an administrative judge to order payment of interest but if the judge fails to do so, the statute self-operates to oblige the insurer to pay. The purpose and the plain meaning of § 50 are so intrinsically tied to an employee's proven entitlement to compensation payments, which the insurer disputed and withheld, that its application is self-operative.

Refund to an employee of the § 11A(2) appeal fee required to defray the cost of an impartial medical examination simply does not stand on the same footing. The statute does not require a judge to order the refund of the fee to the employee and, therefore a judge's failure to do so does not render the statute self-operative. If, as in this case, payment is not ordered by the terms of the hearing decision, no § 8(1) penalty can attach

to an insurer's failure to pay.

In so deciding, however, we do not intend to excuse the insurer's dilatory approach to reimbursement of the $175 fee. According to the stipulation of the parties, (Ex. 9), the insurer made no payment to anyone until sometime after the March 7, 2001 conference on the § 8(1) penalty claim, forty-one weeks or more after the original hearing decision issued and thirty-three weeks or more after the employee's attorney wrote to the insurer requesting reimbursement. (Ex. 6.) Even if, as the insurer insists, the reimbursement was owed to employee's counsel and not the employee, its failure to pay was egregious, but it was not punishable under § 8(1).

The decision is reversed. So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **September 3, 2003**

MAZE-ROTHSTEIN, J., dissenting. The majority has determined that the case at hand does not lend itself to application of G. L. c. 152, § 8(1), because there was no specific order in the original decision for the subject refund payment to be paid to the employee. I disagree.

Although an administrative judge has an obligation to address the issues raised at hearing, see G. L. c. 152, § 11B, the judge need not write about every possible statutory application in a particular case. Many provisions of the Act are self-operative. For example, an insurer must pay § 50 interest to a prevailing employee -- when it is due according to its statutory requirements[14] -- whether or not a judge orders it. Drumm v. Viale Florist, 16 Mass. Workers' Comp. Rep. 335 (2002). The statute under scrutiny in this case, § 11A(2), provides in pertinent part "that such amount [of the fee for the impartial medical examination] paid by a claimant shall be refunded by the insurer to the claimant who prevails at the hearing." G. L. c. 152, § 11A(2), as amended by St. 1991, c. 398, § 30. Like § 50, this language is mandatory, so long as its predicates are satisfied, i.e., the employee's payment of the fee or part of it, and prevailing at hearing. Unnecessary and inapplicable digressions into the foggier questions of "prevailing" aside,[15] there is no dispute that both were met here.

Upon receiving that hearing decision, § 11A(2) obligated the insurer to refund the $175 fee paid by the claimant. The truth of this plain fact is underscored by my experience in a decade of reviewing hundreds of hearing decisions. I have never once seen a decision explicitly order payment of the § 11A(2) fee. This resounding decisional

[14] General Laws c. 152, § 50, provides, in pertinent part:

> Whenever payments of any kind are not made within sixty days of being claimed by an employee, dependent or other party, and an order or decision requires that such payments be made, interest at the rate of ten percent per annum of all sums due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision.

[15] The majority's entire and lengthy page of string citations on whether an employee has "prevailed" is inapposite where, as is true here, the employee was awarded unappealed temporary total incapacity benefits on an original liability claim. As the majority concludes, there is no doubt or question that the employee prevailed in the case at bar.

silence means only one of two things: either no employee has ever been reimbursed since it has never been explicitly ordered -- a statistical impossibility --, or all parties, that is, until today's pronouncements, have understood the self-operative nature of this statute. There is no need, as the majority reasons, for a specific "line item" directive to trigger that obligation; by its self-operative nature, the reimbursement requirement of § 11A(2) is incorporated in hearing decisions where, as here, the payor employee prevails. In other words, the $175 was a "payment due [the] employee under the terms of an order [or] decision." Those other words are, of course, stated in § 8(1). Thus, the failure to timely pay that amount falls well within the purview of the statutory penalty.

In discussing the strict construction of penalty provisions, the majority correctly cites reasoning from Collatos v. Boston Retirement Bd., 396 Mass. 684, 686-687 (1986) for the "ancient rule that . . . a penalty . . . must be . . . manifested by [its] express words *or by necessary implication*." (Emphasis added.) This entire case is about the latter proposition, a statutorily required "necessary implication." Such necessary implications have already been explored and clearly identified by the reviewing board. Referring again, for example, to § 50, it is truly telling that we have concluded that a § 8(1) penalty may be assessed for an insurer's failure to timely make *that* self-operative "payment[] due the employee." Favata v. Atlas Oil Co., 12 Mass. Workers' Comp. Rep. 12, 14 (1998); Taylor v. Morton Hosp. & Med. Ctr., Inc., 16 Mass. Workers' Comp. Rep. 30, 37-38 (2002). There can be no distinction drawn between the nexus of § 8(1) to an insurer's unqualified obligation to pay § 50 interest where due, and its identical link to an insurer's unqualified § 11A(2) obligation to refund the impartial medical examination fee (or any part thereof) to a prevailing employee. The majority draws no meaningful point in attempting to distinguish the Favata and Taylor cases, and ultimately concedes, as it must, that the failure to pay § 50 interest when an employee has prevailed statutorily triggers § 8(1) penalties. For the majority to then contradict the rulings in Favata and Taylor, supra, with its denial of such § 8(1) applicability here is truly erroneous.

The fulcrum for the majority's analysis is the concept that because there was no explicit order for the § 8(1) penalty, the judge improperly looked beyond the "four

corners" of the decision for proof. As support, the majority looks to the inapposite case of Montleon v. Massachusetts Dept. of Pub. Works, 16 Mass. Workers' Comp. Rep. 354, 358-359 (2002). Montleon was a question of whether a § 30G office of education and vocational rehabilitation determination was itself an "order" or "decision" that could trigger a § 8(1) penalty. It was not, and it could not. Here it is the administrative judge's decision alone, awarding benefits on the employee's original claim, which triggers the § 11A (2) statutorily required payment obligation and the § 8(1) penalty for failure to pay it. That the judge then looked to standard evidentiary proof of the employee's out of pocket payment, though ultimately unnecessary, is no more improper here than it was in each of the § 30 medical benefit, § 8(1) penalty cases cited by the majority where the employee had to prove an out of pocket payment in order to obtain the nonpayment penalty fee. See Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528 (1996); Ngo v. Jeffco Fibres, Inc., 10 Mass. Workers' Comp. Rep. 286 (1996), affd., Ngo's Case, 12 Mass. App. Ct. 1108 (1997).

The majority fails to recognize the unique mandate that § 11A(2) sets out regarding the refund of the fee to the employee or "claimant," as the statute designates: "that such amount paid by a claimant shall be refunded by the insurer to any claimant who prevails at the hearing." It is apparent from the four corners of the decision if the employee appealed the conference order, and prevails, thereby rendering her liable for the entire fee (or part of it if the conference order was the subject of a cross-appeal). The insurer therefore needs only to discern that, and send the check. There is no issue of whether the employee's attorney forwarded the money for the fee. The statute does not condone, or even address that, and neither does the earliest interpretation of the statute. In addressing the equal protection challenge to the statute's two–tiered system for the impartial fee, the Supreme Judicial Court opined:

> We are unconvinced by the department's argument that the Legislature reasonably could have concluded that claimants proceeding with the assistance of counsel should be singled out because attorneys may advance the cost of the fee and be reimbursed by the insurer if their clients' claims are successful. First, there is no evidence that this practice is customary among attorneys handling workers

> compensation claims. Next S.J.C. Rule 3:07, Canon 5, DR 5-103(B), as appearing in 382 Mass. 779 (1981), provides that an attorney may not advance litigation costs to a client unless "the client remains ultimately liable." This rule prohibits an attorney from advancing litigation costs if the attorney has no expectation of recovering such costs, the rationale being that an attorney may not acquire an interest in the subject matter of the litigation if such interest hinders the attorney's exercise of independent professional judgment.

Murphy v. Commissioner of the Dept. of Indus. Accidents, 415 Mass. 218, 232, n. 20 (1993). In other words, if the attorney advances the impartial fee, he can surely get it back from his client, to whom the insurer must pay the fee under the unequivocal language of § 11A(2). Any attorney advance is, thus, merely a temporary pass through. The simple truth is that employees pay the § 11A(2) fees on their appeals from conference orders. The upshot of the Murphy court's compelling statutory analysis and construction is that the entire IOLTA issue, belabored by the majority, and the judge's findings in that regard, vanish in a puff of smoke.[16]

The majority accurately cites to Collatos, supra and DeLano v. Milstein, 56 Mass. App. Ct. 923 (2002), that penalty provisions require strict construction. Although I agree that a $10,000 penalty stemming from the nonpayment of $175 appears disproportionate, we do not have the discretion to ignore or reduce the statutory provision. DeLano, supra. Moreover, we have applied the same mandated penalty scale for nonpayment of medical bills, regardless of their amount, that are made out of pocket by employees. See Diaz, supra; Ngo's Case, supra. The statutory language is what it is and our role is to simply apply it to the facts at hand.

[16] Even if the IOLTA issue remained in the case, which it does not, the law of agency supports the disposition that I urge in this dissent. The insurer here was in possession of all of the information necessary for it to know that the employee was the actual payor of the $175 IOLTA check sent to its attorney. It is common knowledge among the legal profession that an IOLTA account is exclusively client funds. (See footnote 6.) The insurer, as client of the attorney, was charged with whatever responsibility accompanied its attorney's knowledge of the source of the funds. Billert v. Rainbow Nursing Home, 13 Mass. Workers' Comp. Rep. 360, 369-371 (1999)(client as principal is vicariously liable for agent attorney's conduct). If its attorney did not clarify the legal import of the refund being drawn on an IOLTA account, the insurer's complaint is perhaps better directed toward that omission. The majority's conclusory statement to the contrary does not contest this.

Finally, the majority quotes 452 Code Mass. Regs. § 1.02 to support its conclusion that the payment of the fee is not a necessary expense for the purposes of incorporating it into the judge's decision. However, this reasoning is faulty because the regulation is inapposite, as the majority tacitly acknowledges in footnote 5 supra. The pertinent language in question reads as follows:

> Necessary Expenses as used in M.G.L. c. 152, § 13A, shall mean all reasonable out-of-pocket costs, as the Department may set, to a claimant's attorney incurred by said attorney in prosecuting a claim for benefits or contesting a complaint filed by the insurer. . . . Filing fees and impartial physician deposition costs . . . which are paid by claimant's counsel, shall not be submitted as necessary expenses but *shall be reimbursable directly from the insurer against whom the claimant prevails at hearing.*

452 Code Mass. Regs. § 1.02 (emphasis added). The regulation merely reiterates that § 11A(2) treats the impartial fee in the particular manner that it does, that is, establishing the refunding of the fee as a primary obligation on the part of the insurer, without the necessity of line item order or request. "The burden imposed on financially disadvantaged workers," by "requir[ing them] . . . to disburse money early in the proceeding as a predicate to asserting their right . . . is particularly obvious," Murphy, supra at 231, and this may very well have been the legislature's reason for preventing insurers' spiting them -- when they prevail at hearing -- by refusing to fulfill the unambiguous statutory directive to refund the fee to such employees under § 11A(2).

Accordingly, I dissent.

Susan Maze-Rothstein
Administrative Law Judge

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