COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board No.:** 055202-99

Employee: Carl Grundy
Employer: Penske Truck Leasing
Insurer: Old Republic Insurance Co.

REVIEWING BOARD DECISION

(Judges McCarthy, Costigan and Horan)

APPEARANCES

Bernardo J. Cabral, Esq., for the employee
David M. O'Connor, Esq., for the insurer

McCARTHY, J. Both parties appeal from an administrative judge's decision ordering the insurer to pay the employee a $10,000 penalty pursuant to G.L. c. 152, § 8(1), for its failure to make all payments due the employee within ninety days pursuant to a § 19 agreement. The insurer argues the assessment of the penalty was in error. The employee maintains that, in addition to the penalty, he is entitled to § 50 interest on the penalty. For the following reasons, we uphold the penalty award, and order the insurer to pay interest on that award.

On September 1, 1999, the employee suffered an industrial injury to both upper extremities. His claim for compensation was resolved by way of a lump sum settlement approved on April 4, 2002, in which the insurer accepted liability. Shortly thereafter, the employee, who had been living in New Bedford, Massachusetts, moved to Florida, as the lump sum agreement indicated he planned to do. (Dec. 4.) The insurer received a letter dated April 23, 2004, from the employee's attorney notifying it of the employee's Florida address. (Dec. 3.)

In September 2004, after unsuccessfully attempting to obtain reimbursement from the insurer for out-of-pocket medical and prescription expenses, the employee filed a claim. Following a conciliation, on June 23, 2005, the parties executed a § 19 agreement, approved by the department, in which the insurer agreed to reimburse the employee for

the claimed expenses. Prior to the execution of the agreement, the insurer issued checks to the employee. However, those checks, directed to his Massachusetts address, were returned as undeliverable. (Dec. 6.) On August 19, 2005, at his Florida address, the employee received a check dated June 30, 2005, in the amount of $3,231.13,[1] for his out-of-pocket prescription medication expenses. Three months after that, in November 2005, the employee received a second check for $1,625 for reimbursement of his payments to his doctor. (Dec. 4-5.)

On or about November 16, 2005, the employee filed a claim for § 8(1) penalties, [2] alleging that the insurer had not made all payments required by the § 19 agreement in a timely manner. (Dec. 8.) Following a § 10A conference, an administrative judge denied the claim, and the employee appealed. At hearing, the insurer conceded the employee had not received all payments due within ninety days following execution of the agreement. However, the insurer maintained that it had made timely payment by mailing checks, which were returned as undeliverable, to the employee's New Bedford address on May 27, 2005, after the parties had reached agreement at conciliation, but prior to the execution and approval of the § 19 agreement. The insurer blamed the delay in the

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[1] The decision states the agreement to pay out-of-pocket prescriptions was for $3,232.13, and the check was for $3,213.13. (Dec. 5.) These figures appear to be a scrivener's error. (See Ex. 7, Agreement to Compensation.)

[2] General Laws c. 152, § 8(1), provides, in relevant part:

> Any failure of an 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.

(Emphasis added.)

employee's receipt of payment on the employee's failure to notify the insurer of his address in Florida by filing a Form 114 indicating his new address. [3] (Dec. 7.)

Pursuant to the stipulation of the parties, the judge found that the insurer had received written notice of the employee's address in Florida as early as April of 2004, (Dec. 3, 8), over a year before the execution of the § 19 agreement. The judge also found the employee's Florida address was on his September 27, 2004, claim for medical treatment. (Dec. 8.) The claims adjuster admitted her claims notes of October 1, 2004, reflected that the employee was then residing in Holiday, Florida. (Dec. 5; Ex. 14.) Furthermore, the § 19 agreement itself stated that the employee lived in Florida, though it did not list his street address. (Dec. 8; Ex. 17.) However, the claims adjuster testified that she did not change the employee's address in the system, even after being informed of it. (Dec. 5; Tr. 66-67.) The judge found that, according to the claims supervisor, address changes were made in an employee's file by a clerical assistant, or occasionally by a claims adjuster, when a Form 114 was submitted, or when the insurer was informed of an address change by telephone or other correspondence. (Dec. 6-7.) The judge found no explanation as to why the employee's address was not changed in this instance. (Dec. 8.)

The judge concluded that the June 23, 2005 § 19 agreement to reimburse the employee for out-of-pocket doctor's bills and prescription expenses fell within the documents described in § 8(1). Accordingly, since the employee did not receive the full payment for more than ninety days after the agreement was executed and approved, he was entitled to a $10,000 penalty: "Whether due to mistake or inadvertence, penalties are appropriate where there is such a late payment. . . . There is no clear exception for this situation under the statute or prevailing case law." (Dec. 8.)

On appeal, the insurer contends it was error for the judge to award the employee a penalty for two reasons. First, the insurer argues the § 19 agreement was somehow made ambiguous and unenforceable by the insurer's attempted payment, on May 27, 2005, pursuant to an informal, unwritten agreement. Second, the insurer maintains that because the employee did not file a Form 114 notifying it of his change of address, it should not be penalized for its admittedly late payment. Both the insurer's arguments turn on the

[3] The parties stipulated the employee did not file a "Form 114" ("Notice of Change/Appearance of Counsel"), see Ex. 11, at any time after 2001. (Dec. 3.)

question of whether the insurer had received adequate notice of the employee's address change prior to the execution of the § 19 agreement. Thus, we address the insurer's second argument first.

The insurer points to no statutory or regulatory requirement that the employee notify the insurer of his change of address via the filing of a Form 114. [4] Moreover, the insurer's argument that the employee was required to file a Form 114 to notify the insurer of his new address is contradicted by the testimony of the insurer's claims supervisor, who stated the insurer did not require the filing of that form to effect a change of address, but rather an adjuster should change an address upon receiving "a call or letter or some other form of request." (Tr. 123-124; Dec. 6-7.) The insurer stipulated it received the employee's letter notifying it of his Florida address as early as April 2004, (Dec. 3), although the claims adjuster did not recall having seen it. (Dec. 5.) The claims adjuster testified that, as of October 1, 2004, she was aware the employee then lived in Holiday, Florida, as reflected in her claims notes of that date, but she did nothing to effect a change of address in the insurer's computer system. (Tr. 64-65.) In addition, the insurer does not deny that the employee's September 2004 claim for reimbursement showed his new address, (see Ex. 6), or that the § 19 agreement stated he lived in Florida. (See Ex. 7.) Nevertheless, no one affiliated with the insurer changed the employee's address in its system. (Dec. 5.) Under these circumstances, the insurer was "on notice," (Dec. 8), of the employee's change of address, and cannot avoid a § 8(1) penalty on the ground that a specific departmental form was not filed. [5]

Because the insurer had adequate notice of the employee's Florida address long before May 27, 2005, it cannot rely on its mailing of checks on that date to an incorrect address to establish that it fulfilled its obligation to make "all payments due [the] employee under the terms of [the] . . . agreement." § 8(1). Though the insurer's attempt to pay the

[4] Form 114 is entitled "Notice of Change/Appearance of Counsel." On the form is printed: "This form must be filed when an attorney appears as legal counsel for the first time or a change of counsel has occurred." The form also has a box to check to indicate if the employee has a new address.

[5] We do not find apposite the insurer's argument that Mass. R.Civ.P. 11(d) and cases construing it require the employee to file a Form 114. That rule applies to notification of a court of a change of appearance or address by an attorney or party not represented by an attorney. In any event, the rule only requires notice be in writing, as the notice was here

employee pursuant to the informal, unwritten agreement reached at conciliation may have been well intentioned, its obligation to pay the employee became enforceable, and the penalty clock began to run, only when the § 19 agreement was executed and approved. Guilfoyle's Case, 44 Mass. App. Ct. 344, 347 (1998). [6] Contrary to the insurer's argument, the § 19 agreement, along with its attachments, was not ambiguous. It explicitly set out the dates of medical treatment and prescription purchases, as well as the costs of each, for which the insurer was to reimburse the employee. [7] (Ex. 7, Agreement to Compensation.) See Kemp v. Victory Market, 17 Mass. Workers' Comp. Rep. 22, 25 (2003)(§ 8[1] penalty properly ordered since judge had before him amount owed to employee as a sum certain not disputed by insurer). Moreover, neither the copy of the agreement filed with the department, nor the cover letter from the insurer's attorney to the insurer, mentioned any prior attempted payments. (See Exs. 7 and 17.)

The insurer was required to comply with the express terms of the agreement or incur a penalty. See McCarthy's Case, 66 Mass. App. Ct. 541 (2006)(court upheld $10,000 penalty against self-insurer which did not comply with unequivocal terms of order but fashioned its own remedy, even though employee was theoretically fully compensated by self-insurer's methods); Whittle v. Limoliner, Inc., 22 Mass. Workers' Comp. Rep. 51 (2008)(§ 8[1] provides no exception for de minimis violations). Here, even after the insurer sent the $3,231.13 check for prescription reimbursement to the employee in Florida (received by the employee on August 19, 2005), [8] and was notified on September

[6] Section 19 requires that compensation agreements be in writing and approved by the department.

[7] Though "[g]enerally § 8(1) penalties do not apply to medical benefits, as those payments are made to providers, and are not 'payments due an employee[,]' . . . we recognize an exception for reimbursement of out-of-pocket payments made by employees to providers." Kemp supra; DeFilippo v. University of Mass./Amherst, 11 Mass. Workers' Comp. Rep. 383, 387-388 (1997); Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528, 533 (1995).

[8] The claims adjuster speculated that her assistant may have reviewed the file when the $3,231 check was returned, and addressed the check, dated 6/30/05, to the employee in Florida. (Tr. 76, 85.)

7, 2005, that he had only received one check, (Dec. 6, Ex. 16), the adjuster failed to verify the employee's address or to send the $1,625 check for reimbursement of the doctor's visits to the Florida address until November 29, 2005. (See Dec. 5; Ex. 15.) Section 8(1), which is to be strictly construed, Johnson's Case, 69 Mass. App. Ct. 834, 838 (2007), provides no exception for the careless claims handling practices the insurer exhibited here. [9]

The purpose of § 8(1) is "to coerce insurers to make payments on time," and "to punish the tardy payer." Eastern Cas. Ins. Co. v. Roberts, 52 Mass. App. Ct. 619, 625 (2001). Allowing the insurer to escape a § 8(1) penalty under the circumstances presented here does not serve this purpose. Thus, we hold that the insurer's mailing of checks to an address which was no longer valid, after the employee had notified the insurer of his correct address, does not constitute "mak[ing] all payments due an employee under the terms of an . . . agreement," within the meaning of § 8(1).

We turn now to the employee's appeal claiming entitlement to § 50 interest on the penalty. General Laws c. 152, § 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 the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment.

(Emphasis added.) Here, the employee claimed a $10,000 penalty; the insurer did not pay the claim within sixty days, and a decision ordered the insurer to pay the penalty. The judge did not award § 50 interest. However, § 50 is self-operative, meaning it is due without application. See Johnson's Case, supra at 837-838.[10] Thus, the issue is whether a

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[9] See Alliy v. Travelers Ins., 39 Mass. App. Ct. 688, 691 (1995)("Good faith tests as to underpayment or delay are conspicuously absent from Sections 7 and 13A, so that the statutes may operate without further adjudication of the merits of claims for penalties and fees, other than the core question of whether the triggering events have occurred").

[10] In Johnson, however, the court held that § 50 interest must be specifically ordered by an administrative judge in order for a § 8(1) penalty for the failure to pay such interest to attach.

§ 8(1) penalty, awarded at hearing, is one of the "payments of any kind" in § 50 which automatically triggers entitlement to interest. We hold that it is.

Recently, in Morales's Case, 69 Mass. App. Ct. 424 (2007), the Appeals Court interpreted "payments of any kind" to include the Trust Fund's reimbursement to insurers, pursuant to § 37, for compensation paid an employee. [11] In interpreting the phrase, "payments of any kind," the court was " ' "constrained to follow" the plain language of a statute when its "language is plain and unambiguous," and its application would not . . . contravene the Legislature's clear intent.' " Id. at 426-427, quoting Commissioner of Rev. v. Cargill, Inc., 429 Mass. 79, 82 (1999), quoting from White v. Boston, 428 Mass. 250, 253 (1998). The court found that the words "payment" and "reimbursement" were used in chapter 152, "consistently with their 'ordinary lexical meaning,' " which controls, absent explicit legislative "instruction to the contrary." Id. at 427. The court further supported its holding by noting that, "[i]n at least one section of chapter 152, the legislature has used the terms interchangeably and thus made its use of the common meaning explicit." Id.

Similarly, § 8(1) refers to a "penalty . . . *payable* to the employee," (emphasis added), thus implying that a penalty is a payment. Section 8(5) makes this implication explicit. It designates circumstances in which "the employee shall be paid by the insurer *a penalty payment* equal to twenty percent of the additional compensation due." (Emphasis added.) At least two other unrelated sections also equate a "penalty" with a "payment." [12] Thus,

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[11] General Laws c. 152, § 37, provides that an insurer may obtain partial reimbursement from the Trust Fund for payments made to qualifying employees with a known physical impairment who suffer a subsequent injury resulting in a disability that is "substantially greater by reason of the combined effects of such impairment and subsequent personal injury than that disability which would have resulted from the subsequent personal injury alone." See Morales's Case, supra at 425 n.2.

[12] Section 53A provides for the establishment of a procedure for identifying and reporting by insurers "any *penalty payments* . . . which this chapter requires to be excluded from any formula utilized to establish premium rates for workers' compensation insurance." Section 60D gives the Supreme Judicial Court jurisdiction to enforce compliance with "the payment of any . . . penalty" prescribed by that section.

the plain language of the statute supports interpreting "payments of any kind" to include the payment of a penalty.

Moreover, we discern no clear legislative intent to exempt penalties from the interest provisions of § 50. In 1991, the legislature changed the application of § 50 from "compensation" to "payments of any kind." " 'Compensation' has . . . traditionally referred to money paid to enable a claimant to recover losses. In the industrial accident context, such losses typically consist of lost wages, medical expenses, and loss of function or disfigurement." Eastern Cas. Ins. Co., supra at 627. Thus, under the earlier version of the statute, interest was not due on § 35F [13] COLA payments because COLA supplements are not "compensation," Graziano v. Polaroid Corp., 9 Mass. Workers' Comp. Rep. 729, 731-732 (1995), whereas, under the current version of § 50, interest is due on COLA payments. See Martineau v. Sheaffer Easton/Textron, 11 Mass. Workers' Comp. Rep. 12, 14 (1997). By changing the language in § 50 from "compensation" to "payments of *any kind*," the legislature indicated its intent to expand the circumstances in which interest is due. [14]

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[13] Section 35F, which provided cost of living adjustments for § 35 benefits, was repealed by St. 1991, c. 398, effective December 23, 1991.

[14] Section 7(2), explicitly provides that interest is due on the penalty payable under that section:

> If an insurer fails to commence such payment or to make such notification within fourteen days, it shall pay to the employee a penalty in an amount equal to two hundred dollars. Where compensation is later ordered and interest is due the employee under section fifty, such penalty shall be considered compensation for the purpose of computing interest.

Both § 50 and § 7 were amended by St. 1991, c. 398 (§ 77 and § 20, respectively). In Section 50, failure to make "payments of any kind" replaced failure to pay "compensation" as a trigger for interest. However, the 1991 version of § 7 still referred to "compensation for the purpose of computing interest." Regardless of whether this inconsistency was an oversight or was by design, we do not think the explicit treatment of interest with respect to § 7(2) penalties, affects the plain and unambiguous language of § 50 that interest is to be imposed on "any kind" of payments.

We reject the insurer's argument that interest on a penalty is analogous to a penalty on a penalty, and should therefore not apply. In Eastern Casualty, supra, the court held that where a payment arises by operation of statute (as does a § 8[1] penalty not awarded by an order or decision), it is not one of the " *payments due an employee under the terms* of an order, decision, arbitrator's decision, approved lump sum or other agreement . . ." referred to in § 8(1). However, § 50 interest is due on " *payments of any kind* [that] are not made within sixty days of being claimed by an employee [where] an order or decision requires that such payments be made," a broader category of payments. Therefore, following the plain meaning analysis outlined in Morales's Case, supra, and discerning no clear legislative intent to exclude penalty payments from the term "payments of any kind," we hold that a § 8(1) penalty is a "payment of any kind" under§ 50.

We affirm the judge's award of a $10,000 penalty pursuant to § 8(1), and order the insurer to pay interest on the penalty pursuant to § 50. Pursuant to § 13A(6), the insurer shall pay employee's counsel a fee in the amount of $1,458.01.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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