COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS. 49278-97
57269-97
40399-98
13634-99
6324-00

Charles Duggan	Employee
Arthur Blank & Co.	Employer
Arthur Blank & Co.	Self-insurer

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

APPEARANCES
Thomas C. McDonough, Esq., for the employee
Vincent M. Tentindo, Esq., for the self-insurer at hearing
John J. Caniff, Esq., for the self-insurer on appeal

MAZE-ROTHSTEIN, J. The employee and self-insurer cross-appeal from a decision awarding workers' compensation benefits following four separate industrial injuries. In his brief the employee asserts 1) that G. L. c. 152, § 8, penalties were correctly found on the self-insurer's illegal discontinuance; 2) entitlement to § 50 interest; and 3) an inadequate amount and inadequately explained increase of the § 13A(5) legal fee award. The self-insurer's appeal argues error in the § 8 penalty determination; concedes § 50 interest entitlement and submits there was no error in the enhanced fee determination. Finally, it argues there was error in the average weekly wage and earning capacity findings. We address three dispositive issues. Due to the error in the treatment of the employee's claims for § 8 penalties, the calculation of the § 1(1) average weekly wage, and the award of a § 13A attorney's fee, we reverse the decision in part and recommit the case for further findings. See G. L. c. 152, § 11C.

Mr. Duggan worked for the employer as a maintenance mechanic servicing and repairing the company's equipment. He often came into contact with chemicals, solvents and lubricants in his job. He claimed benefits for dermatological industrial injuries on

April 1, 1997 and March 30, 1999, and for orthopedic injuries on December 8, 1997 and September 12, 1998. (Dec. 745-748.) The claims were denied at the § 10A conference, and the employee appealed to a full evidentiary hearing. The G. L. c. 152, § 11A, medical examination was waived as the 1997 and 1999 claims were for initial liability. (Dec. 744.) See 452 Code Mass. Regs. § 1.10(7).[1]

The 1997 dermatological injury to Mr. Duggan's hands due to exposure to chemicals, solvents and lubricants, cost him no significant lost time as he wore protective rubber gloves with cotton liners and used ointment for the condition. See G. L. c. 152, § 6 (five or more calendar days necessary to trigger requirement for first report of injury). The employer later assigned the employee to the position of janitorial supervisor, further reducing exposure to the causative elements. However, the employee's hands continued to bother him. (Dec. 746.)

Mr. Duggan's first of two orthopedic injuries occurred in 1997 when he slipped and fell at work, landing on his back and buttocks. He treated for low back pain for several months, but he did not lose any time from work. Mr. Duggan's second orthopedic injury occurred on September 12, 1998, when he fell through a ceiling landing on his back on the cement floor of an office below. The employee remained out of work for the rest of 1998, and collected temporary total incapacity benefits. While out of work, Duggan's hands recovered completely. (Dec. 747.)

The employee returned to work in January 1999, on a part-time basis. He did not wear gloves upon his return, and within two weeks his hands broke out in a rash. He started wearing gloves again, and worked successfully on a four-hour daily schedule. However, he began to have problems with his hands when he increased his hours to six per day. Mr. Duggan reported his problem to the employer on March 30, 1999, and

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[1] 452 Code Mass. Regs. § 1.10(7) reads:

> In claims where initial liability has not been established, subject to the provisions of M. G. L. c. 152, § 11A(2), and 452 CMR 1.02, the parties may agree in writing at the time of conference that an impartial physician is not required.

continued to work part-time until April 20, 1999, when he worked a full eight hour day. The employee left work after that day, not to return. (Dec. 747-748.)

We need not recount the medical evidence in the case, as it has no bearing on the cross appeals. Suffice it to say that the judge concluded that the employee had suffered all of the injuries claimed. (Dec. 763.) The judge fixed the employee's average weekly wage, as of the time of his March 30, 1999, report of injury to his employer at $927.20. This amount included the total amount of § 34, total incapacity weekly compensation paid to the employee for his September 12, 1998 back injury, pursuant to principles enunciated in Louis's Case, 424 Mass. 136 (1997). See infra. (Dec. 759.) The judge awarded the employee on going § 35, partial incapacity benefits for the March 30, 1999 hand injury with a weekly $400.00 earning capacity ongoing from October 13, 1999, the day after the termination of § 7(1) without-prejudice payments for that injury. (Dec. 761, 766.)

The employee's claim included one for a § 8 penalty based on the self-insurer's failure to give him proper seven days notice of termination of the without prejudice payments. G. L. c. 152, § 8(1). As just noted, the self-insurer paid § 34 benefits without prejudice until October 12, 1999. However, the self-insurer only sent the employee a notice of termination of such benefits on October 6, 1999, six days before the effective date of the termination. (Dec. 760-761.) The judge concluded that the employee was entitled to a penalty under § 8(1) of $10,000.00 for the self-insurer's failure to give the required notice. (Dec. 761-762.)

The self-insurer contends on appeal that the judge erred by awarding the § 8(1) penalty for illegally discontinuing payments without prejudice under § 7(1), in that it did not give the seven day notice of termination required under § 8(1). The self-insurer is correct.

The failure to properly give notice to the employee of an intended termination of benefits is an offense punishable by the penalty available under § 8(5), not § 8(1). See Figuerido's Case, 49 Mass. App. Ct. 906, 907 (2000)(distinguishing between § 8(1)

penalty for insurer's "improperly failing to start timely payments," and improper discontinuance of payments, "a misstep punishable under § 8(5)"). We have noted that,

> [a]§ 8(1) violation of the 7 day notice rule has nothing to do with the § 8(1) penalty. This is so because a violation of the seven day notice provision of § 8(1) (i.e. illegal termination), is not an event which contains the predicate to the application of a § 8(1) penalty, that being the insurer's receipt of "an order, decision, arbitrator's decision, approved lump sum or other agreement, or a certified letter notifying said insurer that the employee has left work after an unsuccessful attempt to return within the time frame determined pursuant to [§ 8(2)(a)]."

Bernier v. LeBaron Foundry, Inc., 16 Mass. Workers' Comp. Rep. 331, 334 (2002). Thus, we conclude that the award of a penalty under the commencement-of-payment penalty provisions of § 8(1) was erroneous.

However, the employee has indeed made a viable case for a penalty under § 8(5), due to the self-insurer's failure to give the seven days notice of termination of § 7(1) without-prejudice payments. The relevant statutory provisions follow:

> Within fourteen days of an insurer's receipt of an employer's first report of injury, or an initial written claim for weekly benefits on a form prescribed by the department, whichever is received first, the insurer shall either commence payment of weekly benefits under this chapter or shall notify the division of administration, the employer, and, by certified mail, the employee, of its refusal to commence payment of weekly benefits.

G. L. c. 152, § 7(1), as amended by St. 1991, c. 398, § 20.

> An insurer may terminate or modify [§ 7(1) without-prejudice] payments at any time within such one hundred eighty day period *without penalty* if such change is based on the actual income of the employee or it gives the employee and the division of administration at least seven days written notice of its intent to stop or modify payments and contest any claim filed. The notice shall specify the grounds and factual basis for stopping or modifying payment of benefits and the insurer's intention to contest any issue and shall state that in order to secure *additional benefits* the employee shall file a claim with the department and insurer within any time limits provided by this chapter.

G. L. c. 152, § 8(1)(emphasis added), as amended by St. 1991, c. 398, §§ 23 to 25.

> Except as specifically provided above, if the insurer terminates, reduces, 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* payment equal to twenty percent of the additional compensation due on the date of such finding. . . . *No termination or modification of benefits not based on actual earnings or an order of the board shall be allowed without seven days written notice to the employee and the department.*

G. L. c. 152, § 8(5)(emphasis added), as amended by St. 1991, c. 398, §§ 23 to 25.

In Bernier, supra, we concluded, based on a harmonious construction of the provisions set out above, that "the only penalty that § 8(1)'s 'without penalty' can refer to is that contained in § 8(5)." Id. at 334. Applying Bernier, supra, to the present case, we likewise conclude that a § 8(5) penalty was due the employee, based on the insurer's failure give him the seven day notice of termination under § 8(1) and the additional compensation later ordered for the hand injury.[2]

We reverse the award of a § 8(1) penalty for the self-insurer's illegal termination of payments-without-prejudice, as such penalty is not due for illegal discontinuances. We recommit the case for the judge to make findings on the amount of a § 8(5) penalty for such illegal discontinuance.

Next, the self-insurer challenges the judge's reliance on Louis's Case, 424 Mass. 136 (1997), to include § 34 benefits paid in the twelve month period prior to the subject industrial accident in the employee's average weekly wages under § 1(1). We agree that Louis was wrongly applied, and reverse the assignment of an average weekly wage based on that application for the following reasons.

In Louis, supra, the Supreme Judicial Court held that § 35 partial incapacity indemnity benefits paid to an employee while she was working part-time light duty after

[2] The self-insurer's assertion that it did, in fact, give seven days notice, and that the employee is counting incorrectly, is put to rest by our recent decision in Mansaray v. City Foods, 16 Mass. Workers' Comp. Rep. 210 (2002). In that case we followed the general rule that " 'where time is to be computed from a particular day, or from the day of a specified act, such day is excluded and the last day of the period is included in the computation.' " Id., quoting Daly v. District Court of Western Hampden, 304 Mass. 86, 94 (1939). "It is generally held that the day from which a time period is to be computed is not counted in the computation of the period." Commonwealth v. Cromer, 365 Mass. 519, 521 n. 3 (1974). As the termination notice was mailed on October 6, 1999, and benefits were terminated on October 12, 1999, the employee did not receive seven days notice.

an industrial injury were includable in the average weekly wage assigned for a subsequent industrial injury that occurred while working at that part-time job. Id. at 139-142. However, unlike the § 35 benefits paid while the employee worked light duty after her prior industrial injury, § 34 total incapacity benefits are necessarily paid for time in which the employee is *entirely prevented* from working due to an industrial injury. As such, the judge should have looked to the "time lost" provision of § 1(1) to determine the employee's average weekly wages.[3] The Supreme Judicial Court has effectively defined "time lost" as a period in which the employee was prevented from working:

> The board ruled that the employee [teacher]'s summer vacation was *not* "time lost" or a period which he received less than five dollars in wages" because the employee was *not prevented from working.* [Citations omitted]. A teacher is free to pursue employment either within the school system or elsewhere during the summer vacation period. A teacher is not eligible for unemployment benefits during this time and benefits such as health insurance are not terminated during the summer period. It is within the teacher's discretion whether he works during the summer vacation period.

Herbst's Case, 416 Mass. 648, 650 (1993)(emphasis added). In the present case, the employee *was* prevented from working, due to earlier industrial injuries, during the pertinent time period for which the judge treated the § 34 benefits as earnings. Following the court's rationale in Herbst, supra, the judge should have treated the period at issue as "time lost," and excluded it from the average weekly wage calculation. While the judge's utilization of the principles set out in Louis, supra, was interesting, the first resort should have been to the statute itself, where the distinction between partial incapacity benefits and temporary total incapacity benefits – borne out in the language of § 1(1) – cannot be

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[3] General Laws c. 152, § 1(1), as amended by St. 1991, c. 522, § 98, defines average weekly wages as

> The earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two," provided, however, that "if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost is deducted.

ignored. If the parties are unable to reach an agreement as to the average weekly wage, after the disputed weeks in which § 34 benefits were paid are removed from the calculation, they may take their dispute before the judge on recommittal.

Regarding the self-insurer's last argument, seeing no error, we summarily affirm the judge's assignment of a $400.00 earning capacity and award of § 35 benefits based on that earning capacity.[4]

Finally, the employee contends in his appeal that the fee increase was inadequate and the judge should have given reasons for the small increase in the § 13A(5) fee. This is correct. See Thompson v. Sturdy Memorial Hospital, 13 Mass. Workers' Comp. Rep. 427 (1999)(rule requires findings); Keefe v. Massachusetts Bay Transp. Autho., 16 Mass. Workers' Comp. Rep. __ (Dec. 4, 2002)(§ 13A(5) fee may also be enhanced for work on a recommitted case). On recommittal, the judge should explain his reasoning in awarding the employee's attorney a § 13A(5) fee increased by $700.00.

Accordingly, we reverse the decision in part and recommit the case for further findings consistent with this opinion.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: May 5, 2003

Sara Holmes Wilson
Administrative Law Judge

[4] We note that the self-insurer has agreed with the employee's contention on appeal that § 50 interest is due, insofar as the judge's award of benefits is sustained. Since we have indeed sustained that award, we remind the self-insurer that it must pay § 50 interest on the newly calculated average weekly wage.