COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 01646196**

Daniel Torres	Employee
New England Card & Index Co.	Employer
The Hartford	Insurer

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES
Robert P. Kelley, Esq., for the employee
David G. Sullivan, Esq., for the insurer

SMITH, J. The employee appeals from a decision that awarded partial incapacity and medical benefits, but denied the claim for a penalty under the provisions of § 8(1). The employee claims that the judge erred in his interpretation of G.L. c. 152, § 8, by determining that the penalty provisions of subsection (1) do not apply to without-prejudice payments made pursuant to § 7(1) and referenced in § 8(1).[1] We disagree and affirm the decision.

The relevant facts are not in dispute. On May 7, 1996, Torres injured his lower back in a slip and fall at work. He was out of work and was paid on a without-prejudice

[1] General Laws c. 152, § 7(1) provides, in pertinent part:

> Within fourteen days of an insurer's receipt of an employer's first report of injury, or an initial 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 employee, of its refusal to commence payment of weekly benefits.

General Laws c. 152, § 8(1) provides, in pertinent part:

> An insurer which makes timely payments pursuant to subsection one of section seven, may make such payments for a period of one hundred eighty calendar days from the commencement of disability without affecting its right to contest any issue arising under this chapter.

basis from May 7, 1996 to June 27, 1996. Torres returned to work on or about July 1, 1996 in a light duty position offered by the employer. (Dec. 4.) The insurer terminated its § 7 payments-without-prejudice on the basis of Torres's earnings at the light duty job.[2] (Insurer's Notification of Termination or Modification of Weekly Compensation During Payment-Without-Prejudice Period.) Torres left this job on or about July 19, 1996, because he could not perform the duties due to his compromised physical condition.

On August 6, 1996, Torres sent certified letters to the employer and the insurer notifying them that he could not continue the light duty job because of his work-related disability. The letters requested that the insurer resume payments-without-prejudice. The employer and insurer signed the return receipts acknowledging receipt of the notice. (Employee Ex. 3.) The insurer did not resume payments until ordered to pay partial incapacity benefits by the hearing decision, which is the subject of this appeal. (Employee Ex. 3; Dec. 3, 9.)

The judge denied Torres's claim that he was entitled to a penalty under the provisions of § 8(1) because the insurer failed to resume payments upon receipt of notice that his attempt to return to work had been unsuccessful. The judge found:

> [T]he Employee has alleged entitlement to penalties under Section 8(1) and (2) of the Act for two reasons – neither of which are applicable, essentially because payments at the time were lawfully made "without prejudice." The penalty provisions apply only in the context of an "accepted" case where the Insurer stands obligated to continue weekly indemnity benefits under that Section. The facts of this case do not support the Employee's claim, and I find no entitlement to penalties under Section 8.

(Dec. 7.) Torres appeals this denial of his claim for a penalty to the reviewing board. We affirm the decision for the reasons that follow.

Section 8(1) provides, in pertinent part:

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[2] While not a part of the record, the employer apparently paid the employee his regular pre-injury wage for this light duty assignment. (Insurer's Notification of Termination or Modification of Weekly Compensation During Payment-Without-Prejudice Period.) The employee makes no argument to the contrary, and he does not contend any entitlement to benefits for the period in which he was working at the light duty job.

> 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, *or certified letter notifying said insurer that the employee has left work after an unsuccessful attempt to return within the time frame determined pursuant to paragraph (a)*[3] *of subsection (2) of this section* within fourteen days of the insurer's receipt of such document, shall result in a penalty of two hundred dollars . . . . (Emphasis supplied.)

Section 8(2)(c) provides in pertinent part:

> An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations: . . . .
> (c) the employee has returned to work; provided, however, that the insurer shall forthwith resume payments if, within twenty-eight calendar days of return to such employment, the employee leaves such employment and, within twenty-one calendar days thereafter, informs the employer and insurer by certified letter that the disability resulting from the injury renders him incapable of performing such work . . . .

Torres contends he is entitled to a penalty because the insurer failed to give the required notice that it did not intend to resume § 7 payments after his unsuccessful attempt to return to work. (Employee Brief 3.) Torres's argument ignores that an insurer is permitted to terminate or modify § 7 payments-without-prejudice under two distinct sets of circumstances:

> An insurer may terminate or modify payments at any time within such one hundred eighty day period without penalty [1] if such change is based on the actual income of the employee or [2] if 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.

G.L. c. 152, § 8(1). Once an insurer lawfully terminates payments due to an employee's "actual income" at his light duty job, it is not obliged to do more. There is no dispute that here the insurer appropriately terminated § 7 payments in accordance with Torres's "actual income" upon returning to light duty work.

[3] The reference to subsection (a) is an obvious legislative scrivener's error, as it is subsection (c), which actually refers to the certified letter that is the subject of the clause.

This case is governed by the Appeals Court's decision in Guilfoyle's Case, 44 Mass. App. Ct. 344 (1998), in which it denied an employee's claim for § 8(1) penalties to apply to an allegedly unlawful termination of § 7 pay-without-prejudice benefits. The employee and self-insurer in that case somehow executed an agreement to extend the without-prejudice period under § 8(6), after the self-insurer had already lawfully terminated such payments. Id. at 347. The court rejected the employee's penalty claim:

> At the time the agreement to extend the payment period was approved by the department, [the employee's] benefits had already been terminated by the [self-insurer with the appropriate seven day notice] on the basis of Dr. Fishbaugh's opinion that he was able to return to work as a correction officer with some restrictions. The termination of [the employee's] benefits was properly effectuated in accordance with the provisions of G.L. c. 152, § 8(1). In light of the fact that [the employee] was no longer receiving workers' compensation benefits, there was nothing to extend. . . . [T]he [self-insurer] was not obligated to pay [the employee] workers' compensation benefits after such benefits had been properly terminated.

Id. at 348.

Similarly, in the present case, there is no dispute that the termination of the employee's "benefits was properly effectuated in accordance with the provisions of G.L. c. 152, § 8(1)[,]" when he had "actual earnings" from his return to a light duty job. Such termination is specifically deemed lawful in § 8(2)(e): "An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations: (e) payments are terminated or modified pursuant to subsection (1)[.]" When Torres returned to work with sufficient "actual income" to warrant the termination, the insurer bore no obligation to Torres, and Torres had no right to any action on the part of the insurer. The provisions cited by Torres -- those of § 8(2)(c) -- are inapplicable, since § 8(2) (e) already applied and foreclosed the application of another subsection of § 8(2).

Section 8(2)(c) logically refers to cases in which there has been an establishment of liability by order, decision or voluntary acceptance. Without the establishment of liability, the insurer's lawful termination under § 8(1) and (2)(e) imposed no continuing

obligation on it. Just as there was "nothing to extend" under § 8(6) in Guilfoyle, supra, there is nothing to "resume" under § 8(2)(c) in the present case.

The decision is not arbitrary or capricious, or contrary to law, and thus we affirm it. G.L. c. 152, § 11C.

So ordered.

Suzanne E.K. Smith
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: June 28, 1999