COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 042713-99**
Debra O'Brien	Employee
Franklin Sports, Inc.	Employer
TIG Insurance Co. c/o Managed Comp.	Insurer

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

APPEARANCES
Daniel F. Clifford, Jr., Esq., for the employee
Aaron E. Morrison, Esq., for the insurer

WILSON, J. The sole issue on appeal by the insurer is the judge's award of a G. L. c. 152, § 8(1), penalty for the insurer's failure to make all payments due under a conference order in a timely fashion.[1] Because the § 8(1) penalty provisions do not apply to the subject omission, we reverse the award of the § 8(1) penalty.

The pertinent facts are as follow. The insurer sought modification or discontinuance of the employee's ongoing weekly benefits based on a September 30, 1999 injury. On February 23, 2001, the judge denied the request following a § 10A conference proceeding, allowing the employee's § 34 benefit payments to continue. The insurer appealed to a full evidentiary hearing. (Dec. 2.) In the interim, the insurer failed to make payments due under the conference order for the period of May 20, 2001 to October 13, 2001, until October 20, 2001. In the decision filed on July 22, 2002, the judge agreed with the employee's joined claim that such omission was in the nature of an illegal discontinuance for that period, and concluded that, the insurer having failed to pay weekly benefits for more than ninety days, a penalty under § 8(1) in the amount of

[1] The administrative judge's award of weekly benefits for temporary, total incapacity under § 34 was for a closed period from January 12, 2000 to June 12, 2001. (Dec. 8.)

$10,000.00 was due.[2] (Dec. 7-8.) The judge otherwise allowed the insurer's request for discontinuance as of June 12, 2001, and allowed the insurer to offset the amount of its overpayment from the $10,000.00 penalty. (Dec. 8.)

The award of the § 8(1) penalty was contrary to law. The statute 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, 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) 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, 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.

G. L. c. 152, § 8(1), as amended by St. 1991, c. 398, § 23 (emphasis added). By its very terms, § 8(1) cannot apply after benefits have commenced under a § 8(1) "document," such as the conference order in the present case. The graduated schedule of penalties is triggered only by the "failure of an insurer to make all payments due an employee . . . within fourteen days of the insurer's receipt of such document." Thus, despite the employee's argument to the contrary, a § 8(1) penalty cannot be assessed on an insurer's unauthorized and illegal discontinuance of benefits, as it involves no receipt of a § 8(1)

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[2] Although the judge did not make findings regarding the insurer's resumption of benefits and retroactive payment, the insurer sets out its version thusly:

> Shortly after counsel for the Insurer was properly notified of the oversight, the Insurer issued a retroactive check for the full amount of past-due weekly benefits, plus interest.
>
> The Insurer's action in reinstating the Employee's weekly benefits, by October 20, 2001, was entirely voluntary and not made pursuant to an order, decision or agreement [citation omitted].

(Insurer brief 2.)

document to start the fourteen-day clock running. The Appeals Court has agreed with this interpretation of § 8(1). In Figueiredo's Case, 49 Mass. App. Ct. 906 (2000)(rescript op.), the court distinguished between the penalty provisions of § 8(1) and those of § 8(5), which address illegal termination of, reduction of, and general failure to make payments required under c. 152: The insurer had illegally discontinued benefits ordered in a hearing decision from August 1993, to April 1994, and had improperly paid benefits at the reduced rate ordered after it had recouped prior overpayments. The court stated the parties' positions:

> Figueiredo claims, based on the language of § 8(1), . . . that because American failed to make "all payments" due under the 1990 order of benefits for more than ninety days (i.e., August 3, 1993, to April, 1994, and continued $10 weekly recoupment), he is owed $10,000. American, on the other hand, argues that the DIA correctly assessed this penalty under § 8(5), because rather than improperly failing to start timely (within fourteen days of the 1990 order) benefits, which § 8(1) penalizes, here American improperly discontinued (August, 1993, to April, 1994) Figueiredo's benefits and reduced (after March, 1994) his partial incapacity benefits, a misstep punishable under § 8(5).
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> We are, as was the single justice, persuaded by American's interpretation of the instant circumstances.

Id. at 907. See Bernier v. LeBaron Foundry, Inc., 16 Mass. Workers' Comp. Rep. 331, 332 (2002)(recognizing and discussing distinction between § 8(1) failure to commence payment penalties and § 8(5) illegal discontinuance penalties).[3] See also DeLano v. Milstein, 56 Mass. App. Ct. 923 (2002)(rescript op.)(penalty provisions must be strictly construed).[4]

Accordingly, we reverse the award of a § 8(1) penalty.

So ordered.

[3] The employee makes no attempt to argue that § 8(5) applies to these circumstances.

[4] It is for the Legislature to craft a penalty provision that precisely addresses an unauthorized discontinuance and voluntary repayment and resumption of benefits such as occurred here.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **June 9, 2003**

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge