COMMONWEALTH OF MASSACHUSTTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017245-99**

Edward Bernier	Employee
Lebaron Foundry, Inc.	Employer
New Hampshire Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Levine)

APPEARANCES
James K. Meehan, Esq., for the employee
Edward M. Moriarty, Jr., Esq., for the insurer

CARROLL, J. The insurer on appeal from a decision of an administrative judge presents an issue of first impression: Does a § 8(5) penalty attach for failure of the insurer to give seven day notice of termination of without prejudice payments, and, if so, what is it? We conclude that it does, and therefore affirm the judge's award of the § 8(5) penalty. We clarify that award by concluding that the penalty shall be paid on the retroactive benefits ordered at the § 10A conference.

Due to a right knee work injury on May 18, 1999, Edward Bernier was paid § 34 temporary total incapacity benefits on a without prejudice basis from May 19, 1999 to January 5, 2000. (Dec. 2, 12.) The insurer terminated those benefits without giving the required timely seven-day notice of its intent to stop payment of benefits. (Dec. 11, Insurer's Notification of Termination, Employee's Ex. 2.) The employee filed a claim for further § 34 benefits or, in the alternative, § 35 temporary partial incapacity benefits and for § 8 penalties. (Dec. 2, 3, 12.) At conference, the insurer was ordered to pay further § 35 benefits from January 5, 2000 to date and continuing. Both parties appealed to a hearing de novo. (Dec. 2.)

After making findings on incapacity which are not contested in this appeal, the judge found that as a result of the work injury the employee was totally, temporarily

incapacitated for a period up to December 20,1999, and partially incapacitated thereafter, and that the employee was entitled to § 8 penalties. (Dec.12.)

The statutory scheme embodied in § 8 contemplates the payment of a penalty both for the failure to commence payment of benefits agreed to or ordered, and for the illegal termination of payments. The former omission triggers the graduated penalties of § 8(1). See Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528 (1995). The latter invokes the penalty that is at issue in the present case, that available under § 8(5). See Figueiredo's Case, 49 Mass. App. Ct. 906, 907 (2000)(rescript op.)(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)").[1] Section 8(5) states, in its entirety:

> 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 amount paid as a penalty under this section shall be included in any formula utilized to establish premium rates for workers' compensation insurance. *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). It is well-established that the § 8(5) penalty attaches to an insurer's unilateral and illegal termination of compensation benefits paid where liability has been determined, i.e. "with prejudice." See Peterson v. Vella, Jr., 15 Mass. Workers' Comp. Rep. 298, 300 (2001). The insurer here contests its application where it has been paying the employee under the statutory provisions for payments-without-prejudice, §§ 7(1), 8(1) and 8(6). Those provisions read, in relevant part:

> 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

[1] We have also concluded that, under the appropriate circumstances, an insurer's failure to pay a § 30 order of medical benefits for specific treatment rendered can trigger a § 8(5) penalty. See DeFilippo v. University of Mass./Amherst, 11 Mass. Workers' Comp. Rep. 383, 388-389 (1997).

> administration, the employer, and, by certified mail, the employee, of its refusal to commence payment of weekly benefits.

§ 7(1)(emphasis added).

> An insurer may terminate or modify [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.

§ 8(1)(emphasis added).

> Any one hundred eighty day payment without prejudice period herein provided may be extended to a period not to exceed one year by agreement of the parties . . .
> All the provisions of subsection (1) of this section shall apply to any period of payment without prejudice extended as provided in this subsection.

§ 8(6).

The statutory language must be read to bring the § 8(5) penalty within the ambit of payments without prejudice. Section 8(1) explicitly contemplates a penalty for failure to follow the two plainly marked paths for termination of payments without prejudice, knowledge of actual earnings of the employee or, relevant to this case, seven days notice. At first blush, one can be confused to realize that the penalty referenced in the § 8(1) phrase "without penalty," is not the commencement-of-payment penalty set out in the second paragraph of § 8(1). Put another way, 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)]." Thus, the only penalty that § 8(1)'s "without penalty" can refer to is that contained in § 8(5).

Moreover, the language of subsections (1) and (5) reflect each other in relevant respects. Section 8(1) describes the contents of the seven-day notice, that it "shall state that in order to secure *additional* benefits the employee shall file a claim." (Emphasis added.) Section 8(5) provides for twenty percent on *"additional* compensation due" (emphasis added) and reiterates the termination requirement of insurer knowledge of the employee's actual earnings or seven days notice. Because we strive to read statutes – and, indeed, *subsections* of the same statute – harmoniously, see Bradley v. Commonwealth Gas Co., 13 Mass. Workers' Comp. Rep. 142, 150-151 (1999), we can only conclude the Legislature intended a § 8(5) penalty for an insurer's failure to properly terminate payments without prejudice under §§7(1) and 8(1).

The insurer also argues that no penalty is due because no additional benefits were due as a result of the § 11 hearing, which resulted in recoupment due under § 11D(3). The insurer is focusing on the wrong event. The compensation that is "additional" here is the compensation ordered at the § 10A conference. Therefore, the twenty percent must be paid on the additional compensation due on the date of such finding in the conference order. That amount constitutes the retroactive benefits ordered, from date of the illegal termination, January 5, 2000, until the date of the conference order, May 24, 2000. With that clarification, the decision is accordingly affirmed.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed:
MC/jdm