COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 003507-93**

Gary Harding	Employee
Northern Mechanical Corp.	Employer
ACE American Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, McCarthy and Fabricant)

APPEARANCES
Lori A. Harling, Esq., for the employee
Donald E. Hamill, Jr., Esq., for the insurer

HORAN, J. The employee appeals from a decision denying his claims for penalties under G. L. c. 152, § 8(1).[1] We affirm the decision.

The employee sustained a work-related left knee injury on February 2, 1993, and the insurer paid weekly incapacity and medical benefits. Thereafter, the insurer filed a complaint to modify or discontinue the employee's benefits. At the hearing on appeal from the conference order, the judge allowed the employee to join August 13, 1995 as a second date of injury. In her September 12, 1996 hearing decision,[2] the judge addressed the employee's claim for ongoing § 30 medical benefits:

> [P]ursuant to Sections 13 and 30, Insurer shall pay for the arthroscopic surgery to determine whether Employee is an appropriate candidate for the cartilage transplantation surgery. If Employee's physician(s) determine

[1] General Laws c. 152, § 8(1), provides, in pertinent 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 to work . . . within fourteen days of the insurer's receipt of such document, shall result in a penalty. . . .

[2] Citations to the 1996 hearing decision are designated, "Dec. I," and to the 2006 decision, "Dec. II."

> cartilage transplantation is appropriate (as explained above), Insurer shall pay for the surgery. In addition, Insurer shall continue to pay all ongoing reasonable and necessary treatment related to Employee's *left knee injury* for both dates of injury.

(Dec. I, 2, 16-17; emphasis added.) The judge's decision makes no reference to a back injury.

On May 2, 1997, the employee underwent a MRI of his lumbar spine. The employee subsequently filed a claim for medical benefits, and for a penalty under § 8(1) for late payment of same. These claims were addressed by a different judge in a conference order filed on October 28, 1998, which denied the penalty and ordered the insurer to pay § 30 benefits for the same treatments ordered by the prior judge's 1996 hearing decision. The conference order did not specifically mention the MRI of the lumber spine. Our review of the board file indicates no specific reference to the lumbar MRI bill in the claim which was the subject of the October 28, 1998 conference order; it also reveals the employee's appeal of that order was administratively withdrawn.[3]

On November 19, 2001, the employee filed another claim for medical benefits, which the insurer denied, "concerning the specific issue of non-payment of the 1997 MRI bill." (Dec. II, 5.) On October 4, 2002, a third judge denied the claim at conference, and the employee appealed. On December 8, 2003, prior to the hearing on his appeal, the employee filed a claim for mileage reimbursement, which the insurer acknowledged in a December 19, 2003 Notification of Payment. (Dec. II, 7-8.) The judge then allowed the employee's motion to join claims for § 8(1) penalties for the insurer's alleged failure to pay the MRI bill, and for its failure to reimburse the employee $31.84 for mileage. The employee claims not to

[3] If the issue of liability for payment of the lumbar MRI bill had been part of his claim, the employee's failure to prosecute his appeal would have foreclosed further litigation of the issue. G. L. c. 152, § 10A(3), provides, in pertinent part:

> Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be an acceptance of the administrative judge's order and findings. . . .

have received his mileage reimbursement until February 12, 2004. In a decision filed on November 9, 2006, the judge denied all of the employee's claims, for reasons we need not recount here. (Dec. II, 11-12.) The employee appeals to this board.

We agree with the insurer's argument that the employee's claim for a $10,000 penalty under § 8(1), stemming from the alleged non-payment of medical bills for a lumbar spine MRI, fails for three distinct reasons. First, payments to third party providers are not "payments due an employee" under § 8(1). Thus, non-payment of § 30 benefits to a medical provider fails to support a claim for a § 8(1) penalty as a matter of law. Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528 (1995). Second, the hearing decision the employee alleges to have addressed the lumbar spine MRI does not, in fact, mention the procedure.[4] A § 8(1) penalty may be charged only for failure to pay benefits specified under the terms of an order, decision, approved lump sum, or other agreement. See footnote 1, supra. The absence of specification of the benefit sought to be paid is fatal to a claim for a § 8(1) penalty. Johnson's Case, 69 Mass. App. Ct. 834 (2007)(no penalty for non-payment of § 50 interest not ordered by decision); Cruthird v. City of Boston Health & Hosp. Dep't., 17 Mass. Workers' Comp. Rep. 421 (2003)(no penalty for non-payment of § 34B benefits not explicitly required to be paid in a § 8(1) document). Finally, there was no order for payment of the lumbar M.R.I. bill for good reason: the employee injured his knee, not his back, at work. (Dec. II, 2, 16-17.) The lumbar MRI study is entirely unrelated to the subject workplace injury and therefore is not, on this record, the insurer's responsibility.

Regarding the mileage reimbursement penalty sought by the employee, there is no evidence that there was any § 19(1) written agreement regarding that reimbursement.[5] Because § 8(1) is penal in nature, see Johnson's Case, supra, we

[4] Indeed, the hearing decision predates the procedure by nine months.

[5] General Laws c. 152, § 19(1) provides:

construe it narrowly. A "document" within the purview of the statute must be one specifically noted in the section. See, e.g., Montleon v. Massachusetts Dep't. of Public Works, 16 Mass. Workers' Comp. Rep. 354, 357 (2002)(office of education and vocational rehabilitation letter is not a § 8(1) document). We do not agree with the employee that a "Notification of Payment" form issued by the insurer qualifies as an "approved . . . agreement" under § 8(1). Accordingly, no penalty can attach to this claim.[6]

The decision is affirmed.

So ordered.

Mark D. Horan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: November 28, 2007

> Except as otherwise provided by section seven, any payment of compensation shall be by written agreement by the parties and subject to the approval of the department. Any other questions arising under this chapter may be so settled by agreement. Said agreements shall for all purposes be enforceable in the same manner as an order under section twelve.

[6] Having determined this issue as a matter of law, we need not recommit the case for factual findings as to whether the insurer actually paid the requested reimbursement within the requisite fourteen day period, as contended by the insurer.