COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 098747-87**
Jefferson Prendergast	Employee
Bay State Volkswagen	Employer
CNA Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Levine and Maze-Rothstein[1])

APPEARANCES

Enoch O'D. Woodhouse, II, Esq., for the employee
John G. Preston, Esq., for the insurer at hearing
Karen Loughlin Foley, Esq., for the insurer on appeal

COSTIGAN, J. The employee appeals from a decision in which an administrative judge found that the insurer's prior payment of G. L. c. 152, § 50, interest on its retroactive payment to the employee of § 34B cost-of-living benefits, and its payment of an attorney's fee to his attorney, were proper. We affirm the decision.

The employee makes the same four arguments on appeal as he made to the administrative judge. First, he contends that interest on the insurer's payment of retroactive cost-of-living adjustment ("COLA") benefits should have been computed from the date COLA benefits were first due, rather than from the date the department received his claim for those benefits. Second, he argues that interest should have been calculated at the rate of twelve per cent, the rate in effect on the date of his injury, rather than the ten per cent rate which has been in effect since 1991, when § 50 was last amended. Third, he maintains that interest should have been compounded. Fourth, the employee contends that his attorney is entitled to an enhanced legal fee exceeding that which the insurer paid when it paid him the retroactive COLA benefits. He suggests that an amount equal to twenty per cent of that retroactive payment is appropriate. Finding no merit in any of these arguments, we affirm the administrative judge's decision.

[1] Judge Maze-Rothstein no longer serves on the reviewing board.

We summarize the pertinent facts and procedural history. The employee's accepted industrial injury occurred on March 5, 1987. After exhausting § 34 benefits, the employee was awarded § 34A permanent and total incapacity benefits in a hearing decision filed on February 23, 1999. The award was retroactive to February 26, 1992, the date § 34 benefits exhausted. (Dec. 2.) In September 2000, the employee filed a claim for unpaid § 34B COLA benefits that, he argues, should have been added automatically by the insurer to his retroactive and ongoing § 34A benefits, once payment commenced pursuant to the 1999 hearing decision. The employee also claimed § 50 interest on the claimed § 34B COLA benefits. (Dec. 3.)

In January 2001, after a conciliation but prior to a § 10A conference on the employee's COLA claim, the insurer voluntarily paid the employee COLA benefits, retroactive to October 1, 1992, totalling $78,392.93.[2] Using the ten per cent rate then (and now) provided in § 50, the insurer also paid interest on the retroactive COLA benefits, from the date the employee's COLA claim was filed with the department to the date of its payment. [3] The interest paid totaled $3,329.01. The insurer also paid the employee's

[2] According to the judge's decision, the insurer's payment of $78,392.93 represented § 34B benefits due the employee from October 1, 1992 to October 1, 2000. (Dec. 1; Joint Ex. 1.) Although a different judge in an earlier hearing decision had found the employee entitled to § 34A permanent and total incapacity benefits as of February 26, 1992, (Dec. 2), § 34B provides for cost-of-living adjustments on October first of each year, the "review date" for purposes of COLA benefits. The employee does not challenge the amount of COLA benefits paid by the insurer. (Dec. 3.)

[3] Section 34B cost-of-living adjustments are "payments of any kind" for purposes of interest due under § 50. See Martineau v. Scheaffer Easton/Textron, 11 Mass. Workers' Comp. Rep. 12, 14 (1997). The plain language of the statute, however, requires payment of interest only under certain circumstances:

> Whenever payments of any kind are not made within sixty days of being claimed by an employee . . . *and an order or decision requires that such payments be made, interest* at the rate of ten percent per annum of all sums due from the date of the receipt of the notice of the claim by the department to the date of payment *shall be required by such order or decision*. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment.

attorney a legal fee of $1,243.36, which would have been the applicable fee under § 13A(2),[4] had this been an initial liability claim, which it was not; had the employee's §

G. L. c. 152, § 50, as amended by St. 1991, c. 398, § 77. (Emphasis added.) The employee contends that § 34B COLA benefits automatically became due pursuant to the 1999 hearing decision awarding him § 34A incapacity benefits because COLA benefits are, by the terms of the statute, to be paid "without application." We reject that argument. See Cruthird v. City of Boston Health & Hosp. Dept., 17 Mass. Workers' Comp. Rep. 420, 423-424 (2003)(because § 34B benefits are not payable to the extent they would reduce any benefits employee is receiving under federal social security law, an order or decision awarding § 34A does not always, by itself, establish entitlement to COLA benefits). That said, we do not condone the insurer's dilatory approach to the question of whether the employee was entitled to COLA benefits. The employee waited over eighteen months, from the February 23, 1999 hearing decision awarding § 34A benefits, for the insurer to determine whether COLA was due, before filing his claim. He then waited another four months for the insurer to decide to pay the eight years of retroactive COLA benefits due. However, because neither a conference order nor a hearing decision had required payment of § 34B benefits, whatever interest the insurer paid was more than that to which the employee was statutorily entitled. As this issue was not raised below, however, we deem it waived, Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), and apply "the law of the case" to this appeal. See Chase Precast Corp. v. John J. Paonessa Co., Inc., 409 Mass. 371, 379 (1991).

[4]Section 13A(2), as in effect from October 1, 2000 to October 1, 2001, provided in pertinent part:

> Whenever an insurer contests an initial liability claim for benefits as provided by subsection (1) [by failing to commence the compensation requested within twenty-one days of receipt of such claim], and then is ordered to pay such benefits by an administrative judge pursuant to a conference held under section ten A, said insurer shall pay an attorney's fee to the employee's counsel in the amount of [$1,243.36], plus necessary expenses; provided however that an administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney . . . .

34B COLA claim gone to a § 10 conference, which it did not; and had the employee prevailed at such a conference, which he did not. (Dec. 3)

The employee did not dispute the amount of retroactive COLA benefits that the insurer paid, but he was dissatisfied with both the insurer's calculation of the § 50 interest and the legal fee his attorney was paid. That dispute proceeded to a § 10A conference in March 2001, following which the judge ordered "that interest be paid on the COLA at the rate of 10% per annum on all sums due from the date of the receipt of the notice of the claim by the department as well as attorneys fees in the amount of $1243.31." [5] (Dec. 3.) The insurer was allowed to take a credit for payments previously made, which were the same as ordered. (Id.)

The employee's appeal of the conference order brought the case to hearing, where his claims were the same as the arguments he advances in this appeal. The judge disagreed with all of the employee's contentions, and awarded the same interest and attorney's fee as the insurer had already paid. (Dec. 7.) We see no error.

The judge correctly ruled that the plain language of § 50, (see footnote 3, supra), provides for payment of interest only from the date the department received the employee's claim,

---

Because the insurer paid the COLA benefits claimed by the employee more than twenty-one days after its receipt of that non-initial liability claim, but prior to a § 10A conference, the attorney's fee due was governed by § 13A(3). That statute, as in effect on January 5, 2001, when the insurer paid the COLA benefits claimed, provided in pertinent part:

> Whenever an insurer contests a claim for benefits on a form prescribed by the department other than an initial liability claim as provided by subsection (1), by failing to commence the compensation requested within twenty-one days of receipt of such claim and then, at any time prior to a conference pursuant to section ten A the insurer agrees to pay the compensation claimed to be due, said insurer shall pay an attorney's fee to the employee's counsel in the amount of [$621.69], plus necessary expenses . . . .

[5] The amount of the legal fee appears to be a typographical error, as all other references to the fee in the hearing decision correctly reflect that the amount paid was $1,243.36. (Dec. 2, 3, 6 and 7.)

not from the date of the commencement of the underlying entitlement upon which interest is payable. (Dec. 6.) See Conroy v. City of Boston, 392 Mass. 216, 219 (1984)(where language of statute is plain and unambiguous, its words must be interpreted in accordance with ordinary and approved meaning). That is all that need be said to dispose of the employee's first argument. The fact that § 50 is self-operative and need not be claimed to be due, see Le v. Boston Steel & Mfg. Co., 14 Mass. Workers' Comp. Rep. 75, 77-78 (2000), is irrelevant to the plain meaning of the statute.

The judge also correctly ruled that § 50 does not provide for compounding. In plain and unambiguous terms, the statute provides that interest is to be computed "on each unpaid weekly payment." It does not provide that the computation be made on each weekly payment due *plus* the § 50 interest due on that weekly payment. Given the specificity of the manner of computation set out by the statute, we will not add terms that the legislature did not include. See Johnson's Case, 318 Mass. 741, 747 (1945)(language of statute not to be enlarged or limited by construction unless its object and plain meaning require it). As to the $78,392.93 in retroactive weekly COLA benefits paid by the insurer, the computation of interest is straightforward: simple interest is to be paid on that amount, from the date the department received the employee's § 34B claim to the date the insurer paid those benefits. [6]

As to the applicable rate of interest, the judge properly determined that the rate of interest applicable to the retroactive COLA payment was ten per cent, as provided from and after the 1991 amendment to § 50. St. 1991, c. 398, § 77. Section 105, a so-called "outside" section of that legislation, specified that "notwithstanding the provisions of section two A of chapter one hundred and fifty two of the General Laws, section seventy seven of this act shall apply to only those claims filed on or after the effective date of this act, [December 23, 1991]." Contrary to the employee's argument, the date of injury does not govern which version of § 50 is applicable to his claim. Because his claim for § 34B

[6] As we are permitted to do, Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), we take judicial notice of the employee's claim contained in the board file, stamped as received by the department on September 7, 2000. The insurer issued payment of the retroactive COLA benefits by check dated January 5, 2001. (Dec. 1; Joint Ex. 1.)

COLA benefits was filed in September 2000, the applicable rate of interest was ten per cent -- the rate used by the insurer and upheld by the administrative judge.

Lastly, as to the employee's request for an attorney's fee equal to twenty per cent of the retroactive COLA payment, or $15,678.59, we do not share the judge's view that the employee "confused the prior proceeding with a lump sum settlement, wherein a twenty-percent fee is applicable in an accepted case." (Dec. 6.) Rather, the employee seems to be proposing a creative, but impermissible, hybrid of §§ 13A and 8(5). [7] The judge correctly ruled that payment of attorneys' fees is governed by § 13A of the act. She found that the $1,243.36 fee the insurer paid to employee's counsel was proper under that statute. For the reasons given in footnote 4, supra, we disagree that that amount was the fee to which the employee's attorney was entitled. Moreover, unlike the attorney's fees available under §§ 13A(2), 13A(5) and 13A(6), to an employee who prevails, which fees may be increased (or decreased) by the judge based on the complexity of the dispute or the effort expended by the attorney, § 13A(3) authorizes no such enhancement. Even if the administrative judge had determined that the efforts expended by the employee's attorney to secure COLA benefits for the employee, prior to filing a formal claim, would have warranted an increased fee, she was without statutory authority to order one, and properly

---

[7] We note the employee's contention that the administrative judge "erred in failing to allow argument by the Employee's attorney as to violations of c. 152, § 8(5)." (Employee brief, 5.) There was no such error. That statute provides in pertinent part:

> (5) 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 per cent of the additional compensation due on the date of such finding.

Id., as amended by St. 1991, c. 398, §§ 23 to 25. Even if we assume, for argument's sake, that the insurer failed to pay COLA benefits required under c. 152, (but see footnote 3, supra), additional compensation was not "later ordered" -- the insurer paid COLA voluntarily, prior to a conference on the § 34B claim. And in any event, the twenty per cent payment is a penalty payable to the employee. It has no bearing on the legal fee payable to the employee's attorney.

declined to do so. Just as with the § 50 interest, the attorney's fee paid by the insurer was more than that to which the employee was entitled. Because the insurer has not appealed the judge's decision, however, we affirm her fee award.

The decision of the administrative judge is affirmed.

So ordered.

_____
Patricia A. Costigan
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

Filed: June 30, 2004