COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035728-98**

Jeffrey Hill	Employee
Dunhill Staffing Systems, Inc.	Employer
Fireman's Fund Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Levine)

APPEARANCES
Michael D. Facchini, Esq., for the employee
at hearing on recommittal and on appeal
Gerard A. Butler, Esq., for the insurer
at hearing on recommittal and on appeal

COSTIGAN, J. The employee appeals on two grounds from the administrative judge's decision on recommittal from the reviewing board. See Hill v. Dunhill Staffing Sys., Inc., 14 Mass. Workers' Comp. Rep. 350 (2000).[1] First, he claims that the judge erred in assigning him a weekly earning capacity of $250.00 which, when applied to the corrected average weekly wage of $266.99 found by the judge, resulted in a § 35 partial incapacity rate of $10.19. As the employee did not appeal the judge's original decision which assigned that same earning capacity, and he did not move to join the issue of earning capacity at the

[1] We refer to the judge's original hearing decision, filed on December 21, 1999, as "Dec. I" and his decision on recommittal, filed on December 6, 2001, as "Dec. II." In his first decision, the administrative judge awarded the employee weekly temporary total and temporary partial incapacity benefits, based on a $585.00 average weekly wage to which both parties had stipulated. (Dec. I, 4; Tr. 3.) Only the insurer appealed that decision, asserting that the stipulated average weekly wage was incorrect. The reviewing board recommitted the case to the administrative judge to reconsider his denial of the insurer's post-decision motion to vacate the average weekly wage stipulation, and also to consider whether to join the employee's post-decision claim for § 8 penalties, based on the insurer's alleged failure to pay benefits in accordance with the 1999 hearing decision. Hill, supra at 352.

hearing on recommittal, he cannot properly raise that issue now. Jones v. Wayland, 374 Mass. 249, 252-253 n.3 (1978); Dudley v. Yellow Freight, 15 Mass. Workers' Comp. Rep. 205, 207 (2001). We therefore affirm the judge's decision as to the employee's earning capacity and the award of § 35 benefits.

The employee's second argument is that the administrative judge erred as a matter of law in failing to assess § 8 penalties against the insurer. The judge's decision contains but two references to that issue. Under the heading, "Procedural History," the judge wrote, "I also agreed to consider penalties against the insurer, as they [sic] had unilaterally reduced the employee's benefits to reflect an Average Weekly Wage of $199.58." (Dec. II, 1-2.) Under the heading, "Discussion and General Findings of Fact," the judge wrote, "[h]aving considered the actions of both parties in this matter, I decline to assess penalties." (Id. at 2.) Given the dearth of factual findings, and the state of the putative record which comes to us, the task of determining whether the judge's refusal to assess § 8 penalties is, as the employee contends, reversible error cannot be confined to a review of that record.

The reviewing board's recommittal order directed the judge to "hear the parties on the [average weekly wage] issue and consider whether to take evidence." Hill, supra at 352. The judge's decision on recommittal reflects that he accepted into evidence as an insurer's exhibit a document identified as "Wages Paid," which lists not only the weekly wages earned by the employee in the five weeks preceding his industrial injury but also his wages for a five-week period after the injury, when he worked in a light duty status for the employer. (Dec. II, 1; Insurer Exhibit A.) That sole document is the extent of the evidentiary record before us.

It appears that at the September 10, 2001 proceeding, no live sworn

testimony was offered by either party [2] and no stenographic record was made.[3] Thus, we have no way of knowing what, if any, evidence was before the judge which would support his finding that the insurer "unilaterally reduced the employee's benefits to reflect an Average Weekly Wage of $199.58." (Dec. II, 2.) Certainly, there is no documentary evidence to that effect and any oral arguments made to the judge by counsel do not constitute evidence. This sorry state of affairs calls upon us to repeat an exhortation made by this board over a decade ago: "We urge practitioners and judges alike to conduct all but the most extraneous of trial business on the record." Murphy v. City of Boston (School Dep't.), 4 Mass. Workers' Comp. Rep. 169, 173 n.8 (1990).

It is axiomatic that the employee bore the burden of proving every element of his claim for § 8 penalties. Sponatski's Case, 220 Mass. 526 (1915); Kerrigan v. Commercial Masonry Corp., 15 Mass. Workers' Comp. Rep. 209, 213 (2001). Those elements would include a) when the insurer received the judge's 1999 hearing decision; b) what benefits it paid to the employee after it received the decision; c) when and for how long those benefits were paid; and d) whether the insurer unilaterally reduced, discontinued, or failed to pay, the benefits ordered. The judge's decision on recommittal does not reflect that the employee offered any evidence as to any of those elements and, without a stenographic record, we would be unable to determine whether the employee met his burden of proof, but

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[2] In its brief to the reviewing board, the insurer states that in addition to the employee's wage schedule, an affidavit from one Debra Cross was submitted to the administrative judge. (Insurer Brief, 2.) The affidavit was not identified as an exhibit in evidence by the judge in his decision and we do not find it in the Board file. The affidavit was, however, appended to the insurer's brief. It attests to the employee's wages while employed by Dunhill, the same information contained in the admitted wage schedule.

[3] Although the judge's decision contains the usual prefatory reference to "having heard the parties in this case," his statement about "meeting with the parties," (Dec. II, 1), is probably a more accurate description of the proceeding on recommittal.

for an important concession made by the insurer to the administrative judge.

Lacking a transcript of the September 10, 2001 hearing on recommittal, we have examined the written filings of both parties on the issue of § 8 penalties, as submitted to the administrative judge and contained in the board file, to determine whether the judge's finding as to unilateral reduction was warranted.[4] In his motion and brief, the employee contended that the insurer did not pay any of the closed period of § 34 benefits awarded by the judge in his 1999 hearing decision and that it paid the ongoing § 35 benefits awarded based on its own calculation of the employee's pre-injury average weekly wage and not the $585.00 figure stipulated to by the parties and used by the judge. (Employee's § 8 Brief, 1-2, 4.)[5]

In its brief to the judge, the insurer conceded that it did not pay benefits in accordance with the 1999 hearing decision:

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[4] These filings consist of the "Employee's Motion for [sic] Section 8 Penalties Be Joined With This Claim," filed on September 10, 2001; the "Employee's Legal Brief in Support For This Court to Order Section 8 Penalties," filed on October 1, 2001, and the "Brief of the Insurer in Opposition to the Awarding of Penalties under Section 8 of the Act," filed on October 15, 2001.

[5] By conference order filed on April 6, 1999, the administrative judge ordered the insurer to pay § 34 benefits at the rate of $351.00 per week, based on a $585.00 pre-injury average weekly wage, but only from and after March 30, 1999, not retroactive to the first date of claimed incapacity. Both parties appealed from that order. The insurer asserts in its brief below that it "made all payments to the Employee in compliance with this Order." (Insurer's § 8 Brief, 2). The employee's motion and brief are silent as to whether the insurer complied with the conference order, and the judge's finding in his decision on recommittal -- that the insurer "had unilaterally reduced the employee's benefits to reflect an Average Weekly Wage of $199.58" -- does not reflect when that reduction was implemented. We do know, however, that at the September 15, 1999 original hearing before the judge, the employee did not raise non-compliance with the conference order as an issue and did not claim § 8 penalties. Thus, the employee's § 8 claim at the recommittal proceeding related only to the insurer's alleged failure to pay benefits in accordance with the rates ordered by the judge in his 1999 hearing decision, and his appeal is limited to that claim.

> The Insurer, if it paid the Employee the acknowledged incorrect weekly rate, would, for all practicable purposes, not have any recourse to recoup such overpayment since the Employee is a permanent resident of the State of Florida. The Insurer could not have applied Section 11D of the Act, since the Earning Capacity assigned by the Administrative Judge ($250.00) is actually greater than the correct average weekly wage.

(Insurer's § 8 Brief, 7-8). Moreover, in its brief to this board, the insurer stated unequivocally that "the Insurer had reduced weekly benefits to reflect the decreased average weekly wage." (Insurer's Brief, 2). At oral argument before this board, the insurer not only reiterated that concession but also acknowledged that it had *never* paid weekly benefits at the rates ordered by the judge in the 1999 hearing decision. Thus, as a matter of law, the insurer is liable for penalties under both § 8(1) and § 8(5).

> Section 8(1) provides in pertinent part:
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> 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 . . . 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. . . .

Because the insurer has conceded that it never made the payments to the employee which were due under the terms of the 1999 hearing decision, i.e., § 34 benefits at the rate of $351.00 per week and § 35 benefits at the rate of $201.00 per week, it is beyond dispute that it failed to make all payments due the employee under the terms of that decision within ninety days of its receipt of that document. The plain language of the statute -- the use of the word "shall" -- renders the imposition of

the $10,000.00 § 8(1) penalty mandatory, not discretionary,[6] and the judge could not properly decline to assess the penalty "based on the actions of both parties." (Dec. II, 2, 4). See Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998) (the words "shall . . . be . . . paid . . ." as used in G. L. c. 152, § 35B are mandatory, not elective at the employee's discretion).

We hold that the insurer is also liable for payment of the penalty prescribed in § 8(5), which provides in pertinent part:

> 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 equal to twenty per cent of the additional compensation due on the date of such finding. . . . 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.

(Emphasis added.) Because such additional compensation was later ordered by

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[6] We attach no significance to the fact, acknowledged by the employee, (Employee Brief, 3-4), that a judge of the superior court declined to enforce the 1999 hearing decision under G.L. c. 152, § 12(1), which provides in pertinent part:

> Whenever any party in interest presents a certified copy of an order or decision of a board member . . . and any papers in connection therewith to the superior court department of the trial court for the county in which the injury occurred or for the county of Suffolk, *the court shall enforce the order or decision*, notwithstanding whether the matters at issue have been appealed and a decision on the merits of the appeal is pending.

(Emphasis added.) The mandatory language of the statute required the judge to enforce the hearing decision. She lacked discretion to refuse to do so. See Biagini's Case, 22 Mass. App. Ct. 103, 104 (1986). Unlike Mr. Biagini, however, Mr. Hill did not appeal the denial of his complaint for enforcement. Nevertheless, what happened in the superior court in November 2000 would not, as the insurer argues, (Insurer's Brief, 3-4), excuse a failure to pay benefits in accordance with the December 1999 hearing decision.

the administrative judge,[7] the employee is also entitled to a penalty equal to 20% of the difference between the benefits paid by the insurer following the 1999 hearing decision and the benefits due the employee under the 2001 decision on recommittal. See Figueiredo's Case, 49 Mass. App. Ct. 906, 907-908 (2000) (§ 8(5) penalty due where insurer had unilaterally discontinued benefits for a period of time and improperly continued to pay benefits at a reduced recoupment rate after recovering its overpayment).

Accordingly, we reverse the decision of the administrative judge as contrary to law and order the insurer to pay the employee both the $10,000.00 penalty under § 8(1) and the penalty due under § 8(5) as set forth in this opinion. Because the employee has prevailed in his penalty claim, we order the insurer to pay an attorney's fee of $4,499.70, the § 13A(5) fee in effect on the filing date of the 2001 decision on recommittal. [8]

So ordered.

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[7] 452 Code Mass. Regs. § 1.02 provides that "Additional Compensation as used in M.G.L. 1. 152, § 8(5), shall mean compensation due pursuant to an order or decision finding that prior compensation was illegally discontinued." In his 2001 decision on recommittal, the administrative judge found that the employee's correct pre-injury average weekly wage was $266.99, not $199.58 as calculated by the insurer, and he awarded § 34 and § 35 benefits based on that amount. The benefits awarded, although lower than those ordered in the original hearing decision, were higher than those paid by the insurer. We therefore consider the award of weekly benefits on recommittal to be an order of additional compensation. See Montleon v. Massachusetts Dep't of Public Works, 16 Mass. Workers' Comp. Rep. ___ (September 11, 2002).

[8] The administrative judge awarded an attorney's fee of $4,263.90 but clarified that it was the original fee ordered in his 1999 decision and, if previously paid by the insurer, was not to be paid again. Because he denied the employee's claim for § 8 penalties, no additional fee was awarded. (Dec. II, 4.)

Patricia A. Costigan
Administrative Law Judge

Jeffrey Hill
Board No. 035728-98

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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