

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 042367-04

John M. Whittle
Limoliner, Inc.
A.I.M. Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Horan and Fabricant ¹)

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Michael C. Akashian, Esq., for the insurer

McCARATHY, J. The insurer raises one issue in this appeal of an administrative judge's award of workers' compensation benefits for the employee's December 24, 2004 work injury. The insurer argues that the judge's award of a \$10,000 penalty under G. L. c. 152, § 8(1), ² for the insurer's underpayment of his § 10A conference order, was error. The insurer bases its argument on the omission of employee's counsel to support the § 8(1) claim with an affidavit outlining the factual foundation for the penalty claim. See 452

¹ Judge Fabricant recused himself from this case and did not participate in panel deliberations.

² 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 . . . 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.

Code Mass. Regs. § 1.07(2)(b).³ For the reasons that follow, we affirm the penalty award.

The facts pertinent to the penalty award are succinct. By the terms of the § 10A conference order, the insurer was ordered to pay the employee a retroactive amount of § 35 benefits, which the insurer admits to underpaying by at least \$43.54. (Dec. 9; Ins. br. 3.) The judge allowed the employee to join a claim for a § 8(1) penalty for such underpayment, and the potential penalty had run up to \$10,000 by the time the hearing was held. The insurer interposed no defense to the employee's penalty claim. (Dec. 2-3, 9.) The judge concluded that the \$10,000 penalty sought was due. (Dec. 9-10.)

The record confirms that the judge correctly concluded the insurer failed to defend - - on any grounds - - against the § 8(1) claim for late payment due the employee. (Dec. 10.) As a result, the insurer's argument on appeal - - that the employee's failure to file an affidavit under 452 Code Mass. Regs. § 1.07 (2)(b) should have barred his penalty claim - - was not preserved for review and is waived. See Stephens v. Global Naps, 70 Mass. App. Ct. 676, 686 n.10 (2007)(issues not argued at trial may not be argued for the first time on appeal); M.H. Gordon & Son, Inc. v. Alcoholic Bevs. Control Comm'n, 386 Mass. 64, 67 (1982)(same).

The judge's conclusion that the unopposed § 8(1) penalty was due cannot be deemed arbitrary, capricious or contrary to law. See § 11C. Even a small underpayment of a conference order supports the award of a § 8(1) penalty. Nothing in the statute allows for an exception for de minimus violations. See Johnson's Case, 69 Mass. App. Ct. 834, 838 (2007)(§ 8(1) must be strictly construed as a penalty provision). The statute requires that insurers be assiduous in complying with claims procedures under c. 152. See McCarthy's Case, 66 Mass. App. Ct. 541, 546 (2006).

The decision is affirmed.

The insurer shall pay counsel for the employee an attorney's fee under § 13A(6) in the amount of \$ 1,458.01.

³ 452 Code Mass. Regs. § 1.07(2)(b) provides, in pertinent part:

Claims for penalties under M.G.L. c. 152, § 8(1) shall be accompanied by a copy of the order . . . with which it is alleged the insurer had failed to comply, together with an affidavit signed by the claimant or the claimant's attorney attesting to the date payment was due, the date, if any on which payment was made, and the amount of penalty the claimant is owed.

John M. Whittle
Board No. 042367-04

So ordered.

William A. McCarthy
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: March 25, 2008