COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 007193-95**

Maria Franco-Duraes	Employee
Greater Lynn Mental Health	Employer
Liberty Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll and Levine)

APPEARANCES
John J. Morrissey, Esq., for the Employee
Clyde B. Kelton, Jr., Esq., for the Insurer

MAZE-ROTHSTEIN, J. The employee appeals a decision, which denied her claim for G. L. c. 152, § 8(1), penalties due to the insurer's failure to give the required seven-day notice prior to terminating weekly benefits, which were being paid without prejudice. We affirm the decision.

Maria Franco-Duraes, sustained a low back strain while at work on February 10, 1995. The insurer timely commenced voluntary payment of temporary, total incapacity benefits on a "without prejudice" basis. See G. L. c. 152, § 7(1).[1] After payments were underway, the insurer sent the employee a Notification of Payment, dated March 21,

[1] General Laws c. 152, § 7(1), provides, in pertinent 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, which- ever is received first, the insurer shall either commence payment of weekly benefits under this chapter or shall notify the division of administration, the employer, and, by certified mail, the employee, of its refusal to commence payment of weekly benefits. . . .

Amended by St. 1991, c. 398, § 20.

1995. Next, on July 19, 1995, the insurer sent a Notification of Termination to the employee by certified mail. The employee received the notice on July 20, 1995. Benefits were paid through July 24, 1995, which was two days short of the required seven-day notice requirement. (Dec. 3.) See G L. c. 152, § 8(1).[2]

Rather than file a claim for further weekly compensation benefits, the employee chose to file a claim for a ten thousand dollar § 8(1) penalty due to the insurer's failure to give the required seven day notice of payment termination under that statute. (Dec. 3-4.) G. L. c. 152, § 8(1). Following a § 10A conference, the judge filed an order denying payment of the penalty sought. The employee appealed to a full evidentiary hearing. (Dec. 2.)

At hearing, the employee and a representative of the insurer testified. (Dec. 1.) Ms. Duraes contended that a penalty under § 8(1) should be awarded because the

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[2] General Laws c. 152, § 8(1), provides, in pertinent part:

> An insurer which makes timely payments pursuant to subsection one of section seven, may make such payments for a period of one hundred eighty calendar days from the commencement of disability without affecting its right to contest any issue arising under this chapter. An insurer may terminate or modify 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 if 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.
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> . . .
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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 payment were required to be paid by 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. . . .

Amended by St. 1991, c. 398, §§ 23 to 25.

insurer failed to give the required 7 day notice before terminating weekly § 34 payments without prejudice. The judge disagreed, reasoning as follows:

> A penalty may not be imposed upon [the insurer] pursuant to G. L. c. 152, § 8(1) unless it has failed to make all payments due to the employee 'under the terms of [an] order, decision, arbitrator's decision, approved lump sum or other agreement.' G. L. c. 152, § 8(1). In the instant case, there was no order, decision, arbitrator's decision or approved lump sum awarding the employee disability benefits. Therefore, it is only left to be determined whether the insurer failed to make payments due under the terms of an agreement.

(Dec. 4.)

The judge discussed the interplay between § 7 payments, without prejudice, and § 19 agreements.[3] Citing Weitzel v. Travelers Insurance Companies, 417 Mass. 149, 153 (1994), she reasoned that compensation agreements within the meaning of the Act must be by written agreement between the parties, see § 19, and that nothing in § 7 creates an exception to that requirement. (Dec. 4.) The judge found that the insurer's Notification of Payment under § 7 did not constitute a §19 agreement, as the employee had never signed the document. Id. Further, the employee acknowledged that she had no agreement with the insurer for the § 7 benefits she received. (Dec. 4-5; November 12, 1996 Tr. 13-14.) In sum, the judge found that, absent said written agreement, the insurer had no obligation to pay the employee and could not be held liable for a § 8(1) penalty. (Dec. 5.)

We affirm the decision and endorse the reasoning supporting the denial of the § 8(1) penalty for the insurer's undisputed failure to give seven day notice of termination of § 7(1) payments, as required by § 8(1). We comment in addition.

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[3] General Laws c. 152, § 19 (1), states in relevant part:

> 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 . . . .

Amended by St. 1991, c. 398, §§ 41, 42.

Weitzel, supra, dealt with the enforceability of an alleged oral agreement to change the rate of payment in a § 7 pay-without-prejudice period. Id. at 150. The court reasoned that, insofar as an oral agreement for compensation was the vehicle for the employee's claim of increased payments under § 7, there was no basis for the claim:

> Section 19 requires that compensation agreements be written and subject to DIA approval in order to be enforceable in the Superior Court. Nothing in § 7, which allows . . . initial payments without prejudice, creates an exception to the requirement in § 19 that compensation agreements must be written.

Id. at 153.

The Weitzel court identified the very different treatment afforded to voluntary payments made under § 7 without an agreement, and those made pursuant to § 19 agreements, which are contractual in nature and establish liability under the Act. In Kareske's Case, 250 Mass. 220, 224 (1924), the court stated that:

> The effect to be given to an agreement with regard to compensation, a memorandum of which has been filed with the department of industrial accidents and approved by it . . . stands like a decision of a single member which the parties have not sought to have reviewed; that it is a final determination of all issues involved in the establishment of the right to compensation; that, as in every other determination whether or not embodied in a decree, the board has jurisdiction to modify the award of compensation as changes take place in the condition of the injured employee . . .[citations omitted] . . . but the basic questions of liability under the law are not open for further consideration or different determination.

Id. See Perkins's Case, 278 Mass. 294, 300-301 (1932); West's Case, 313 Mass. 146, 153 (1943); O'Reilly's Case, 258 Mass. 205, 208-209 (1927)(courts utilize contract principles in addressing compensation agreements).

Thus follows the distinction between without-prejudice payments under § 7 and the treatment of with-prejudice agreements under § 19, acknowledged in the latter with the language: "Except as otherwise provided by section seven . . . ." See Funaro v. J. Herbert Sullivan, 10 Mass. Workers' Comp. Rep. 317, 320 (1996)(options of payments under respective provisions of §§ 7 and 19 "ought not be superimposed"). But see

Guilfoyle's Case, 44 Mass. App. Ct. 344, 346 n. 4 (1998)(inexplicably interpreting Weitzel, in dicta, as holding that § 7 payments-without-prejudice must now be made pursuant to a § 19 agreement). The fact that the penalty provisions of § 8(1) speak directly to the triggering of obligations as of "the insurer's receipt of such [agreement] document" (emphasis added) indicates that those penalties are to apply to failures to make all required payments only where said writing has been received. G. L. c. 152, § 8. There is no order, decision, approved settlement agreement or other documented agreement with regard to voluntary § 7(1) payments without prejudice. Id. As such, § 8(1) penalties do not attach when said payments are untimely terminated.

This is not to say that we condone the insurer's failure to follow the requirement to give the employee the required seven day notice of its intention to terminate § 7(1) without-prejudice payments. We only agree with the administrative judge that § 8(1) penalty provisions do not apply here:[4]

The decision is affirmed.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

[4] General Laws c. 152, § 8(5), might have applied to a claim for further benefits:

> 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 . . . .

Amended by St. 1991, c. 398, §§ 23, 25.

See DeFilippo v. Univ. of Mass. Amherst, 11 Mass. Workers' Comp. Rep. 383 (1997)(for discussion of interplay between §§8(1) and (5)).

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Frederick E. Levine
Administrative Law Judge

Filed: June 4, 1999.