COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 040132-05

Marilyn Bland	Employee
MCI Framingham	Employer
Commonwealth of Massachusetts	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Horan and Koziol)

The case was heard by Administrative Judge Dike.

APPEARANCES

Graham N. Wright, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on brief
James R. Hodder, Esq., for the employee at oral argument
Vincent F. Massey, Esq., for the self-insurer

McCARTHY, J. The employee appeals from an administrative judge's decision allowing the self-insurer to recoup the § 8(5) penalty awarded to her at conference. She also challenges the judge's failure to reinstate § 34 benefits pursuant to § 8(2)(c) following an unsuccessful attempt to return to work. We vacate the finding permitting the self-insurer to recoup the § 8(5) penalty, but otherwise affirm the decision.

Marilyn Bland, age forty-three at hearing, is a high school graduate with one year of junior college and several years' experience as a claims adjustor. Since 1988, she has worked for the employer as a corrections officer. On December 5, 2005, she slipped and fell in the employer's parking lot, suffering a severe right ankle fracture requiring immediate surgery, as well as further surgery in July 2006 to remove screws. (Dec. 3.)

The self-insurer accepted liability and paid § 34 benefits until September 23, 2006,[1] when the employee returned to a light duty position as a pedestrian trap officer. On October 16, 2006, the

[1] The employee states in her brief that after the self-insurer gave seven days notice on September 1, 2006 it would discontinue benefits, she filed a claim, which resulted in an October 11, 2006

employee left work claiming she was unable to perform the job duties of the position due to ankle pain. Contrary to the judge's statement, (Dec. 3), the self-insurer did not reinstate her weekly benefits at that time. As a result, on November 7, 2006, the employee filed a claim for § 34 benefits as well as for § 7 and § 8 penalties due to the self-insurer's refusal to reinstate benefits as of October 17, 2006. Before that claim was heard at conference, the employee attempted to return to the pedestrian trap officer position on January 9, 2007. On January 25, 2007, after working only two weeks, she again left work. (Dec. 4.)

On February 12, 2007, a § 10A conference was held on the employee's claims for benefits under §§ 34, 35, 13 and 30, and penalties under §§ 7 and 8. In an order dated February 15, 2007, the judge required the self-insurer to pay the employee § 35 partial incapacity benefits from October 17, 2006, through January 9, 2007, and ongoing § 35 partial incapacity benefits beginning on January 26, 2007, the day after the employee last left work. The conference order indicated the self-insurer had "discontinued benefits in violation of § 8,"[2] and awarded "an additional 20% penalty of the retroactive benefits ordered herein."[3] (Order of Payment § 35; Dec. 2.)

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agreement that the self-insurer would pay the employee § 34 benefits from September 11, 2006 to September 23, 2006, when she returned to work. (Employee br. 3-4.) The documents in the Board file confirm this scenario. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 161, 162 n.3 (2002)(reviewing board may take judicial notice of documents in the board file).

[2] The order is apparently referencing General Laws c. 152, § 8(2), which states, in pertinent part:

> An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:
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> > (c) the employee has returned to work; provided, however, that the insurer shall forthwith resume payments if, within twenty-eight calendar days of return to such employment, the employee leaves such employment and, within twenty-one calendar days thereafter, informs the employer and insurer by certified letter that the disability resulting from the injury renders him incapable of performing such work; provided, further, that if due, compensation shall be paid under section thirty-five;

[3] General Laws c. 152, § 8(5), provides, in pertinent part:

Only the employee appealed the conference order to a de novo hearing. The judge's statement that both parties appealed, (Dec. 2), is incorrect.[4] At hearing, the employee claimed § 34 benefits from January 26, 2007 through May 1, 2007, the date the § 11A physician had examined her and found her not to be disabled. (Dec. 2, 5.) The parties stipulated that the self-insurer had paid § 35 benefits from January 26, 2007 through June 17, 2007, at which time the employee returned to her regular position. (Tr. 4; Dec. 4.) At the hearing, the judge stated:

> I have advised the employee that there is an overpayment and that a hearing decision may well result in an order of recoupment against her due to this overpayment of *approximately six weeks*.

(Tr. 7.)(Emphasis added.) The six weeks to which the judge referred are apparently the period from May 1, 2007 through June 17, 2007. However, in the decision itself, the judge stated the self-insurer challenged extent of disability and causal relationship, and sought "*recoupment of benefits* paid from January 26, 2007 through June 17, 2007." (Dec. 2.) The hearing decision does not indicate that entitlement to the § 8(5) penalty awarded at conference was an issue. The transcript reflects only that the judge stated: "[t]here is a legal dispute as to the full and [sic] effect of Section 8(2)(c), whether the employee complied with it and whether the insurer met its obligations thereto." (Tr. 6-7.)

In his decision, the judge stated: "[t]he *only* issue before the court is at what rate of compensation should the employee have been paid, if at all, between ending her return to work on light duty and her ultimate return to full duty." (Dec. 7; emphasis added). Based on additional medical evidence submitted by the self-insurer, which addressed the "gap" period prior to the impartial examination, the judge found the employee had been able to work since December 19, 2006, as long as she could sit occasionally and was not required to stand too long. (Dec. 5.) He found the

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> [I]f 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.

[4] The parties agree and the record reflects that only the employee appealed the conference order. (Tr. 5-6; Employee br. 3 n.1; Self-ins. br. 1, 3.) The judge's misapprehension that both parties appealed may account for some of the errors in the decision.

position of pedestrian trap officer, which had been made available to the employee at her full rate of pay, satisfied those requirements. (Dec. 6-7.) Accordingly, the judge denied and dismissed her claim for the period from January 26, 2007 through May 1, 2007. He went on to find the self-insurer "entitled to repayment of all monies paid to the employee for disability benefits payments made for the period between January 26, 2007 and June 17, 2007, *including the penalties assessed against the insurer[sic] as a result of the § 10A conference* of February 12, 2007." (Dec. 8; emphasis added.)

On appeal, the employee first argues the judge erred by authorizing the self-insurer to recoup the § 8(5) penalty awarded at conference. Second, the employee maintains the judge violated the provisions of § 8(2)(c) by failing to order the self-insurer to reinstate § 34 benefits for the period from October 17, 2006 until January 9, 2007, and instead allowing the conference order reinstating benefits at the § 35 level, to stand. (Employee br. 12-13.) We address the employee's second argument first.

The judge was not authorized to address the applicability of § 8(2)(c) to the October 17, 2006 through January 9, 2007 period because, at hearing, as the only party appealing, the employee claimed disability from January 26, 2007 through May 1, 2007. See G. L. c. 152, §§ 10A, 11B. Paganelli v. Massachusetts Tpke. Auth., 21 Mass. Workers' Comp. Rep. 9, 14 (2007), citing Hall v. Boston Park Plaza Hotel, 12 Mass. Workers' Comp. Rep. 188, 190 (1998)(judge limited to deciding issues in controversy). Although the employee's original claim included the earlier time period, she effectively withdrew that claim by failing to raise it as an issue at hearing.[5] See Vibert v. Raytheon Co., 23 Mass. Workers' Comp. Rep. ___ (June 16, 2009)(because employee effectively withdrew claim for back injury at hearing, judge could not consider back condition in determining liability or disability). (Dec. 2.) Thus, we find no error in the judge's failure to address an issue not before him.

We turn now to the employee's argument that the judge erred by ordering recoupment of the § 8(5) penalty assessed at conference. In order for a § 8(5) penalty to accrue, 1) the self-insurer must terminate, reduce or fail to make any payments required under chapter 152; and 2) additional compensation must later be ordered. Montleon v. Massachusetts Dep't of Public

[5] In her hearing memorandum, which is contained in the Board file but not listed as an exhibit, the employee specifically claimed benefits only from January 26, 2007 through May 1, 2007. See Rizzo, supra. At hearing, she acknowledged as correct the judge's statement of the issues, which included only a claim for § 34 benefits from January 26, 2007 to May 2, 2007. (Tr. 4-7.) In her appellate reply brief, as well, she admitted she did not raise the October 17, 2006 through January 9, 2007 period at hearing. (Employee reply br. 3.)

Works, 16 Mass. Workers' Comp. Rep. 354, 361-362 (2002). "Additional compensation as used in . . . § 8(5) shall mean compensation due pursuant to an *order* or decision finding that prior compensation was illegally discontinued." 452 Code Mass. Regs. § 1.02. (Emphasis added.) The § 8(5) penalty at issue here was awarded by conference order which stated the self-insurer had illegally discontinued (and not resumed) benefits under, presumably, § 8(2)(c). The judge awarded two periods of benefits, (from October 17, 2006 through January 9, 2007, and from January 26, 2007 and continuing) and awarded the penalty on "retroactive benefits." It thus appears that there were two periods for which a § 8(5) penalty was authorized for failing to reinstate benefits pursuant to § 8(2)(c).[6] The first was the October 17, 2006 through January 9, 2007 period during which the employee was out of work. The second was the period from January 26, 2007, when the employee again left work, until the conference order issued on February 15, 2007, awarding § 35 benefits. However, because the first period was never put at issue at hearing, the judge's order of recoupment could not properly include benefits paid during that period. See discussion, *infra*.

So much of the decision as authorized recoupment of penalties for the retroactive portion of second period - - January 26, 2007 through February 15, 2007- - is also error.[7] The self-insurer did not appeal the conference order. See G. L. c. 152, § 10A(3).[8] Only the employee appealed to

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[6] The employee assumes the penalty was assessed only for the October 17, 2006 through January 9, 2007 period. (Employee br. 4.) The self-insurer contends the conference order is unclear, since there were two periods to which the penalty could have applied. (Self-ins. br. 4.) Consequently, we cannot determine whether the employee was even paid the alleged penalty that the self-insurer was allowed to recoup.

[7] The reasoning discussed here would obviously apply to the first period (October 17, 2006 through January 9, 2007), if that period had been at issue at the hearing.

[8] General Laws c. 152, § 10A(3) provides, in relevant part,

> Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed *acceptance of the administrative judge's order and findings*, except that a party who has by mistake, accident or other reasonable cause failed to appeal an order within the time limited herein may within one year of such filing petition the commissioner of the department who may permit such hearing if justice and equity require it, notwithstanding that a decree has previously been rendered on any order filed, pursuant to section twelve.

hearing, and her sole claim was for § 34 benefits from January 26, 2007 through May 1, 2007. The judge found she had failed to prove any incapacity for work during that period. On appeal, the employee does not contest the judge's denial of benefits for this period, conceding she did not meet her burden of proof on every element of her claim. Phillips's Case, 41 Mass. App. Ct. 612, 618 (1996).[9] However, by simply claiming § 34 benefits for this period at hearing, the employee did not put at issue the § 8(5) penalty awarded at conference. Nor was the penalty brought into play at hearing by the judge's statement that "there is a legal dispute as to the full . . . effect of Section 8(2)(c)." (Tr. 6-7.) Cf. Alliy v. Travelers Ins. Co., 39 Mass. App. Ct. 688, 690 (1996)(§ 7 penalty is automatic, if claimed). The claim for a § 8(5) penalty was a separate and distinct claim from the employee's claim for weekly benefits. The penalty was explicitly awarded by the judge at conference and the conference order was not appealed by the self-insurer. The employee at hearing did not claim a further penalty.[10] Under these circumstances, the self-insurer lost the ability to contest the penalty awarded at conference, and thereby accepted its terms, except as to those claims made by the employee at hearing. See Gelin v. Vinny Testa's Restaurant, 22 Mass. Workers' Comp. Rep. 221, 223 (2008)(insurer's failure to appeal conference order is tantamount to acceptance of liability pursuant to § 10A[3]); Heredia v. Simmons Co., 10 Mass. Workers' Comp. Rep. 490, 493 (1996)(unappealed conference order determines, for purposes of issue preclusion, only those issues actually presented to judge at conference).

Put simply, by failing to appeal the conference order, the self-insurer accepted liability for payment of the penalty. Therefore, it is not entitled to recoup the penalty.[11]

(Emphasis added.)

[9] In addition, the employee explicitly accepts the judge's order of recoupment of weekly benefits for the January 26, 2007 through June 17, 2007 period. (Employee reply br. 2.). Therefore, even though that recoupment order appears to be at least partly in error for a number of reasons, we consider the issue of its correctness waived, and will not disturb it.

[10] If the self-insurer wanted the judge to address the employee's entitlement to a § 8(5) penalty, it should have petitioned the Commissioner for permission to file a late appeal. See § 10A(3), footnote 8, supra.

[11] Certainly, had the self-insurer appealed the conference order and placed the § 8(5) penalty in issue, we would not be left with the incongruous result of a penalty award for a period (January 26, 2007 - February 15, 2007) where the conference award of incapacity benefits has been reversed. The employee raises no argument challenging the judge's authority to reverse the

Accordingly, we vacate the judge's decision insofar as it allows the self-insurer to recoup the § 8(5) penalty awarded at conference. In all other respects, the decision is affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: September 10, 2009

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incapacity benefits awarded at conference for this period. We note that, at hearing, the employee could have simply claimed benefits from February 15, 2007 through May 1, 2007.