**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 058676-94**

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| Patricia Cozzolino | Employee |
| Quabbin Timber Co. | Employer |
| ACE Property and Casualty Insurance Co. | Insurer |

**REVIEWING BOARD DECISION**
(Judges Costigan, Horan and Fabricant)

**APPEARANCES**
Dennis J. Ellis, Esq., for the employee at hearing
Matthew W. Gendreau, Esq., for the employee on appeal
Donald E. Hamill, Jr., Esq., for the insurer

**COSTIGAN, J.** Finding there was no § 8(1) document which required the insurer to reimburse the employee for certain medical expenses within fourteen days of her request, the administrative judge denied and dismissed the employee's claim for late payment penalties under that statute, and she appealed. We affirm the decision, and set forth the material facts and procedural history.

The employee's catastrophic industrial injury in 1994 rendered her quadriplegic. Since then, she has required professional home health and nursing care on a daily basis. On May 30, 1997, in conjunction with a third party tort settlement under G. L. c. 152, § 15, (Joint Ex. 1), and a lump sum settlement under § 48, (Joint Ex. 2), the employee's son, as her conservator, executed a § 19 agreement with the insurer, (Joint Ex. 3), addressing the provision of those services to the employee and the parties' respective payment obligations. (Dec. 3.)

After executing the § 19 agreement, the conservator began to hire, fire and generally supervise the home health care workers who attended the employee. Every two weeks or so, the conservator sent the insurer his cancelled check and a request for reimbursement of the expenses incurred in providing such home health care services, which payment would be made by the insurer generally within two weeks of its receipt of such request. (Dec. 3-4.) In mid-2002, however, the insurer's

reimbursements started coming later and later, and the employee filed a claim for payment of medical benefits under §§ 13 and 30.

By conference order filed by a different administrative judge on October 17, 2002, the insurer was ordered "to pay $20.30 per hour for 18 hours per day for seven days a week for home health care for the employee pursuant to the agreement M. G. L. c. 152, § 19 approved on May 30, 1997." (Joint Ex. 4.) Neither party appealed from that order. (Dec. 4-5.)

In December 2004, the employee, through her conservator, filed a claim for penalties under § 8(1), alleging that since October 29, 2004, the insurer had failed to pay for weekly home health care costs, and that more than $15,346.80 in reimbursement was then owed.[1] On May 17, 2005, the administrative judge whose decision we review filed a conference order which stated in pertinent part: "[T]he insurer is ordered to continue to pay for the employee's home health care at the rate of $20.30/hour for 18 hours per day for seven days per week, *and is specifically ordered to do so from April 29, 2005 to date and continuing*." (Dec. 2; emphasis added.) Both parties appealed from that conference order.

In her hearing decision, the judge found:

> On May 29, 2005, the employee received payment for the bills incurred from April 29, 2005 through May 16, 2005, which is within 14 days of the issuance of the order requiring the insurer to make those payments. Thereafter, the arrearages began to mount again. The employee waited 95 days for payment of services rendered from May 17, 2005 through July 5, 2005. Other arrearages accrued for the periods from August 5, 2005 through October 24, 2005, October 14 [sic] through December 18, 2005, and December 30, 2005 through January 13, 2006. As a result of these late payments, an extreme financial hardship has been placed upon the employee. As of the date of the hearing [March 6, 2006], the employee had received no reimbursements from the insurer since January 19, 2006. [Footnote omitted.] From January 14, 2006 through March 6, 2006, the employee incurred $17,904.60 of home health care expenses that remained unpaid as of the date of the hearing.

[1] We take judicial notice of the claim form and supporting documentation contained in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

(Dec. 6.) The judge, however, denied the employee's penalty claim, finding the employee did not show that the undisputedly dilatory reimbursements to her conservator were within the scope of § 8(1)'s penalty provisions.

> General Laws c. 152, § 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.

It is well-established that penalty provisions are to be strictly construed. Collatos v. Boston Retirement Bd., 396 Mass. 684 (1986). "The language of § 8(1) is clear and does not need to be 'enlarged or limited by construction.' " McCarthy's Case, 66 Mass. App. Ct. 541, 547 (2006), quoting Gateley's Case, 415 Mass. 397, 399 (1993). In order to trigger its application, § 8(1) requires that one of its specified documents order a payment to the employee. See Johnson's Case, 69 Mass. App. Ct. 834, 839 (2007).

> [Section] 8(1) does not apply to *all payments due*. Rather, it applies to "all payments due an employee under the terms of an order, decision, arbitrator's decision, approved lump sum or other agreement, or certified letter notifying said insurer that the employee has left work after an unsuccessful attempt to return. . . ." G. L. c. 152, § 8(1), as amended by St. 1991, c. 398, § 23. The insurer is required to pay within fourteen days of its "receipt of such document." Id.

Eastern Cas. Ins. Co. v. Roberts, 52 Mass. App. Ct. 619, 630 (2001) (Emphasis in original).

Generally, § 8(1) penalties do not apply to medical benefits, as those payments are made to providers, and are not payments due an employee. Megazzini v. Bell Atlantic, 19 Mass. Workers' Comp. Rep. 167 (2005); see also Pacellini v. Cape Cod Fireplace Shop, 17 Mass. Workers' Comp. Rep. 394 (2003). There is an exception,

however, for documented out-of-pockets payments made by employees to medical providers. Kemp v. Victory Market, 17 Mass. Workers' Comp. Rep. 22 (2003). Such payments *may* be the source of a § 8(1) penalty. Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528, 533 n.4 (1995).

Contrary to the employee's argument, the judge did not err in denying § 8(1) penalties. The judge properly noted that the two conference orders -- the unappealed October 17, 2002 order, and the May 17, 2005 order cross-appealed to the evidentiary hearing -- simply addressed the continued provision to the employee of home health care services at certain rates, but neither ordered payment of specific dollar amounts. (Dec. 2, 5.) To the extent her May 17, 2005 conference order specifically directed the insurer to reimburse the employee for the period from April 29, 2005 to date and continuing, the judge found those §§ 13 and 30 benefits for home health care services were, in fact, paid in a timely fashion for the period from April 29, 2005 through May 16, 2005. (Dec. 6.) The judge concluded the employee did not show the insurer had failed to make any other specifically awarded payments within fourteen day of its receipt of either conference order. (Dec. 7.) We see no error.

> By its very terms, § 8(1) cannot apply after benefits have commenced under a § 8(1) "document," such as the Conference Order in the present case. The graduated schedule of penalties is triggered only by the "failure of an insurer to make all payments due an employee . . . within fourteen days of the insurer's receipt of such document." Thus, despite the employee's argument to the contrary, a § 8(1) penalty cannot be assessed on an insurer's unauthorized and illegal [late payment] of benefits as it involves no receipt of a § 8(1) document to start the fourteen day clock running.

O'Brien v. Franklin Sports, Inc., 17 Mass. Workers' Comp. Rep. 285 (2003).[2]

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[2] The employee did not claim, and the judge did not award, the penalty more befitting the insurer's dilatory approach to reimbursing her the costs of her home health care services. General Laws c. 152, § 8(5), 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 payment equal to twenty per cent of the additional compensation due on the date of such finding.

Moreover, the § 19 agreement between the insurer and the employee's conservator could not give rise to possible § 8(1) penalties. That document addressed only the insurer's obligation to provide home health care services at certain rates. It did not provide, by either dollar amounts or defined periods of time, that specific payments for health care services be reimbursed to the conservator. [3] (Dec. 4.)

Lastly, the periodic requests for reimbursement made by the employee's conservator to the insurer did not, as the employee argues, trigger the "§ 8(1) clock" for the simple reason that they did not belong to any category of document noted in that statute. The judge correctly found that neither the § 19 agreement nor any of the conservator's periodic requests for reimbursement constituted a § 8(1) document requiring the insurer to make payment within fourteen days of the insurer's receipt thereof. Accordingly, neither could be the source of a penalty for late payment.

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See Figueiredo's Case, 49 Mass. App. Ct. 906 (2000) (rescript op.)

[3] The judge quoted the following paragraphs of that agreement as relevant to the employee's penalty claim:

> 7. When the excess monies of the [third party] settlement are exhausted, then Century Indemnity has agreed to pay to Jeffrey Cozzolino as conservator 18 hours of home health care at the prevailing Board rate who will use this money to provide Mrs. Cozzolino with home health aide [sic] and companionship for the date. This represents a compromise between the Employee's request for 24 hour care and the insurer's initial offer to pay 12 hours of home health care or to provide nursing home care at a nursing home.
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> 8. The Insurer and the Employee and her conservator agree to use the excess monies of the third-party tort settlement to pay the unpaid home health aid bills up to a maximum of 24 hours per day. In essence, INA will pay 18 hours for each day at prevailing Board rate. Money paid by the conservator shall reduce the 'Hunter" excess monies available for future contributions.
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> 9. In the event that Mrs. Cozzolino's medical condition changes, all parties reserve the right to petition the Board for a modification of the level of hourly care required by Mrs. Cozzolino.

(Dec. 4, quoting Joint Ex. 3.)

In so deciding, we do not intend to excuse the insurer's dilatory approach to reimbursing the employee's conservator the significant costs of her daily home health care. We share the judge's concern about the "extreme financial hardship" the insurer's chronically late payments caused the conservator.[4] However, for the reasons set forth, the insurer's persistent procrastination, though egregious, was not punishable under § 8(1).[5] Thus, we are compelled to affirm the decision.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **February 21, 2008**

[4] The insurer exhibited utter disregard for more than just its reimbursement obligations. Although counsel for the employee's conservator served the insurer's adjuster with a subpoena duces tecum, she failed to produce her claim file and failed to appear at the March 6, 2006 hearing. (Dec. 4, n.1.)

[5] But see 452 Code Mass. Regs. § 7.04 (3) (d) and (f).