

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 021535-04**

Paul DaSilva (deceased)  
Palladino Landscaping  
Savers Property & Casualty Insurance Co.

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**

(Judges Costigan, Horan and Koziol)

The case was heard by Administrative Judge Chadinha.

**APPEARANCES**

Charles E. Berg, Esq., for the employee at hearing and on brief  
James N. Ellis, Esq., for the employee at hearing and on appeal  
James Riley Hodder, Esq., for the employee on appeal  
Teresa Brooks Benoit, Esq., for the employee at oral argument  
Joanne T. Gray, Esq., for the insurer at hearing  
John J. Canniff, Esq., for the insurer on brief and at oral argument

**COSTIGAN, J.** This case is before the reviewing board on remand from the Appeals Court, DaSilva's Case, 79 Mass. App. Ct. 1125 (2011), which upheld the employee's appeal of our earlier decision, DaSilva v. Palladino Landscaping, 24 Mass. Workers' Comp. Rep. 211 (2010).<sup>1</sup>

We reinstate the judge's award of § 36A benefits in the total amount of \$5,218.32. By statute, however, the award is payable to the deceased employee's dependents or certain surviving family members,<sup>2</sup> not to his estate, as ordered by the judge, and we revise the award accordingly.

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<sup>1</sup> Holding that the deceased employee lacked standing, and the judge lacked subject matter jurisdiction, the reviewing board vacated the hearing judge's award of § 36A benefits to the deceased employee's estate, and dismissed the employee's appeal of the denial of his § 8(5) penalty claim. The Appeals Court reversed our decision and remanded the case for further proceedings.

<sup>2</sup> General Laws c. 152, § 36A, provides, in pertinent part:

We now address the merits of the employee's appeal from the administrative judge's denial and dismissal of his claim for a § 8(5)<sup>3</sup> penalty, based on the insurer's alleged illegal suspension of weekly benefits. On August 13, 2005, the insurer suspended payment of weekly incapacity benefits because the employee failed to appear for a § 45 medical examination.<sup>4</sup> On or about November 22, 2005, the employee filed a claim alleging the insurer's suspension of weekly compensation was illegal and seeking a § 8(5) penalty. The insurer denied the penalty claim but at the conference on February 23, 2006, it voluntarily reinstated the employee's weekly benefits for the six-month period of suspension. (Dec. 2, 4-5.) The administrative judge denied the remaining penalty claim, and the employee appealed. Subsequently, following a guilty finding to a misdemeanor and/or felony, the employee was incarcerated from October 4, 2006 to December 2, 2006. The insurer once again suspended weekly benefits, this time pursuant to G. L. c. 152, § 8(2)(j).<sup>5</sup> On February

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In the event that an injured employee who has become entitled to compensation under section thirty-six dies before fully collecting the said compensation, the balance remaining shall become due and payable in a lump sum to his dependents, or if none, to his surviving issue, or if no surviving issue, then to surviving parents, or if no surviving parents then to surviving brothers and sisters. . . .

<sup>3</sup> General Laws c. 152, § 8(5), provides, in pertinent part:

[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 filing.

<sup>4</sup> General Laws c. 152, § 45, provides, in pertinent part:

After an employee has received an injury, and from time to time thereafter during the continuance of his disability he shall, if requested by the insurer or insured, submit to an examination by a registered physician, furnished and paid for by the insurer or the insured. . . . If the employee refuses to submit to the examination or in any way obstructs it, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.

<sup>5</sup> General Laws c. 152, § 8(2), provides, in pertinent part, that "an insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:

15, 2007, the insurer reinstated payment of § 34 benefits retroactive to December 2, 2006, the date of the employee's release from jail; those benefits expired on July 16, 2007. The employee died on September 4, 2007. (Employee br. 3; Ins. br. 4.)

At hearing, the parties stipulated that the insurer did not give the employee notice of its first suspension of weekly benefits as required by 452 C.M.R. § 1.06 (1).<sup>6</sup> (Dec. 2.) Finding the suspension was illegal, the judge analyzed the employee's § 8(5) penalty claim:

The insurer's position is that because the employee was made whole prior to conference and no additional compensation was later ordered, no penalty should attach.

The employee cites 452 C.M.R. 1.02 wherein additional compensation is defined as "*compensation due* pursuant to an order or decision finding that prior compensation was illegally discontinued." (Emphasis added.) Although I have found that the employee's benefits were illegally terminated, no compensation is due as the result of that finding. The employee had been made whole prior to conference. Given the fact that there is no order for additional compensation, no penalty applies. However, the insurer is cautioned to review its practices regarding suspension of benefits.

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(j) the employee has been incarcerated pursuant to a conviction for a felony or misdemeanor and has thereby forfeited any right to compensation during such period. . . ."

<sup>6</sup> 452 Code Mass. Regs § 1.06(1) provides, in pertinent part:

Such a suspension of weekly compensation [due to failure to attend a § 45 medical examination] shall take effect only after the Department is notified on a form prescribed by the Department and when the insurer sends a written notice of the suspension to the employee and the employee's legal counsel, if any, by certified mail with a copy of the notice also sent to the department. Suspension cannot be commenced until the date the notice is mailed. Such notice shall state the grounds for the suspension and shall contain notification of the re-examination date. The re-examination shall be scheduled to occur not less than seven days nor more than 21 days from the date of notice of the suspension. Such notice shall also instruct the employee that attendance at, and cooperation with, the re-examination shall result in reinstatement of weekly benefits and payment of benefits withheld during the period of such suspension.

(Dec. 7.)<sup>7</sup>

We agree with the administrative judge's conclusion that because there was no additional compensation due the employee in either his conference order or hearing decision, no penalty was due.<sup>8</sup> The statutory language cannot be strained to cover a situation such as exists here. It bears repeating that, "as a penalty provision, the statute must be strictly construed." Delano v. Milstein, 56 Mass. App. Ct. 923 (2002).

It is an ancient rule, to which we have long adhered, that "[p]enal statutes must be construed strictly and not extended by equity, or by the probable or supposed intention of the legislature as derived from doubtful words; but that in order to charge a party with a penalty, [it] must be brought within its operation, as manifested by express words or necessary implication.

Collatos v. Boston Retirement Bd., 398 Mass. 684, 686-687 (1986), quoting Libby v. New York, N.H. & H. R.R., 273 Mass. 522, 525-526 (1930), quoting Cleveland v. Norton, 6 Cush. 380, 383 (1851). Thus, where no "additional compensation" was due at the time of the judge's order, a § 8(5) penalty simply cannot be found to apply.

We also find support for this conclusion, by analogy, in a case addressing an insurer's obligations under G. L. c. 90, § 34M, governing personal injury protection (PIP) benefits. That statute provides, in pertinent part:

Personal injury protection benefits . . . shall be due and payable as loss accrues, upon receipt of reasonable proof of the fact and the amount of expenses and loss incurred. . . . In any case where benefits due and payable remain unpaid for more than thirty days, any unpaid party shall be deemed a party to a contract with the insurer responsible for payment and shall therefore have a right to commence an action in contract for payment of amounts therein determined to be due in accordance with the provision of this chapter. . . . If

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<sup>7</sup> Indeed, no additional compensation was ever claimed by the employee or his legal representative. As to the insurer's suspension of benefits during the employee's incarceration, the judge found that the employee was released on December 2, 2006, the insurer was notified of the release on January 16, 2007, and it reinstated benefits on February 15, 2007. The judge rejected the employee's argument that the insurer was obligated to reinstate payments within fourteen days. He found that the resumption of payment was "quite reasonable," and concluded no § 8(5) penalty was due. (Dec. 7-8.) We agree.

<sup>8</sup> We summarily affirm the decision as to all other issues argued on appeal.

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the unpaid party recovers a judgment for any amount due and payable by the insurer, the court shall assess against the insurer in addition thereto costs and reasonable attorney's fees.

General Laws c. 90, § 34M, as appearing in St. 1972, c. 319. In Fascione v. CNA Ins. Cos., 435 Mass. 88 (2001), the court held that the insurer's late payment of PIP benefits (beyond the thirty-day period prescribed in the statute) did not entitle the insured to interest, costs and attorney's fees on payments arising from the insured's subsequent contract action to recover such benefits, when payment was made in full prior to entry of a judgment in that action. Id. at 93-94. Thus, without a judgment -- analogous to an order or decision for additional compensation due under § 8(5) -- no costs and attorney's fees (in the nature of a late payment penalty) were recoverable.

The Fascione court acknowledged that the PIP late payment provisions were an incomplete answer to the problem:

Fascione suggests that precluding her from recovering costs and attorney's fees will encourage insurers to make late payments and that the Legislature must have intended to deter such conduct. Certainly, the Legislature knows how to impose penalties when a person engages in prohibited conduct. Cf. G. L. c. 93A, § 9(3)(awarding multiple damages for wilful, knowing, or bad faith violations of consumer protection laws); G. L. c. 176D, § 7(court may award punitive damages for unfair methods of competition or deceptive insurance practices). It chose not to do so here. While late payments are not to be encouraged, it is more likely that the Legislature was concerned with insurers that dispute their obligation to pay PIP benefits and force claimants to litigate their case to judgment, rather than insurers that pay PIP benefits inadvertently after the thirty-day period.

Id. at 95.

So, too, employees should not have to wait for reinstatement of c. 152 benefits improperly suspended or terminated. However, we think the legislature's intent in imposing the statutory requirement that "additional compensation is later ordered," for entitlement to "a penalty payment equal to twenty per cent of the additional compensation due on the date of such finding," G. L. c. 152, § 8(5), was to penalize only those insurers who force employees to litigate their claims of illegal suspension or termination of benefits to a conference order or hearing decision. Such was not the

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case here.<sup>9</sup> We perceive no legislative intent that insurers who voluntarily resume or reinstate benefits, whether or not in a timely fashion, should be subject to the same penalty as insurers who do not pay until ordered to do so.

Accordingly, the decision, as herein revised, is affirmed.<sup>10</sup>

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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Catherine Watson Koziol  
Administrative Law Judge

Filed: **August 8, 2011**

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<sup>9</sup> Moreover, other remedies are available. Expedited conferences under G. L. c. 23E, § 6, may be scheduled upon request at the discretion of the senior judge, and to the extent this insurer or any insurer may be found to engage in a pattern of illegal terminations of benefits, the provisions of 452 Code Mass. Regs § 7.04 may offer redress. See Cozzolino v. Quabbin Timber Co., 22 Mass. Workers' Comp. Rep. 19, 24-25 & n.5 (2008).

<sup>10</sup> We summarily affirm the judge's decision as to all other issues argued by the employee.