

## COMMONWEALTH OF MASSACHUSETTS

### DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS.: 007466-05  
030138-05

Paul S. Sloan, Jr.  
Construction Materials Service, Inc.  
Associated Employers Insurance Co.  
American Home Assurance

**Employee**  
**Employer**  
**Insurer**  
**Insurer**

### REVIEWING BOARD DECISION

(Judges Horan, Costigan and McCarthy)

The case was heard by Administrative Judge Chadinha.

### APPEARANCES

Charles E. Berg, Esq., for the employee at hearing  
James N. Ellis, Esq., for the employee on appeal  
John F. Trefethen, Jr., Esq., for the employee at oral argument  
Linda D. Oliveira, Esq., for Associated Employers Ins. Co., at hearing  
Paul M. Moretti, Esq., for Associated Employers Ins. Co., on appeal  
Meredith P. Kelley, Esq., for American Home Assurance

**HORAN, J.** The employee raises three issues on appeal from a decision awarding him a closed period of § 34 total incapacity benefits and ongoing § 35 partial incapacity benefits, but denying his claims of a psychiatric injury and a § 8(1)<sup>1</sup>

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<sup>1</sup> 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, 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.

penalty against American Home Assurance<sup>2</sup> for its failure to pay § 50 interest.<sup>3</sup> We address one issue, and reverse the decision in part.<sup>4</sup>

The pertinent facts are a matter of undisputed procedural history.<sup>5</sup> The employee was injured at work on June 20, 2005. On September 21, 2005, he filed a claim for medical and incapacity benefits.<sup>6</sup> On October 10, 2005, within fourteen days of its receipt of the employee's claim,<sup>7</sup> the insurer paid him \$6,713.16 on a "without-prejudice"<sup>8</sup> basis for the period June 21, 2005 through October 12, 2005.<sup>9</sup>

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<sup>2</sup> The case was tried against successive insurers. Because the conference order and hearing decision obligated American Home Assurance to pay compensation, all references to the "insurer" in this opinion are to that party.

<sup>3</sup> General Laws c. 152, § 50, provides, in pertinent part:

Whenever payments of any kind are not made within sixty days of being claimed by an employee . . . and an order or decision requires that such payments be made, interest at the rate of ten percent per annum of all sums due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment.

<sup>4</sup> We otherwise summarily affirm the decision.

<sup>5</sup> We take judicial notice of the documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

<sup>6</sup> At the conference, the employee claimed incapacity benefits only from July 14, 2005, to date and continuing.

<sup>7</sup> The insurer first received notice of the employee's claim on September 27, 2005.

<sup>8</sup> General Laws c. 152, § 7(1), provides, in pertinent part:

Following a § 10A conference on December 5, 2005, the judge ordered the insurer to pay § 34 benefits to the employee from July 17, 2005 to date and continuing at the rate of \$686.06 per week, based on an average weekly wage of \$1,080.10. The conference order also contained the following instruction:

. . . where payments of any kind have not been made within sixty days of [the] claim, the insurer shall pay interest at the rate of ten percent per annum on all sums due from the date of receipt of the notice of claim until the date of payment of this order.

See footnote 3, supra. Taking credit for the § 34 benefits it had paid voluntarily prior to the conference order, on December 17, 2005, the insurer paid the employee another \$7,729.32 in weekly incapacity benefits, but paid no interest. (Dec. 2, 17.) Instead, it took the position that because its prior payment of benefits — for the period June 21, 2005 through October 12, 2005 — constituted a payment "of any kind" made within sixty days of the employee's claim, no interest was due on the

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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, whichever 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.

General Laws c. 152, § 8, provides, in pertinent part:

(1) 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.

<sup>9</sup> Contrary to the assertion contained in its brief, at oral argument, insurer's counsel conceded the insurer did not terminate the employee's benefits "due to the fact that he failed to attend a scheduled Section 45 examination on October 26, 2005." (Ins. br. 11.)

additional amount ordered at conference. The judge agreed the insurer's prior payment of \$6,713.16 disentitled the employee to § 50 interest on the additional \$7,729.32 in benefits ordered at conference.<sup>10</sup> [10] (Dec. 19.) We turn our attention to the first clause of § 50's statutory language, and note the phrase, "payments of any kind," is subject to different interpretations.

The insurer's argument would have us, ultimately, adopt the view that, in response to a claim, an insurer's singular payment of *any* kind of benefit, irrespective of the dollar amount, the period it covers (as in the case of weekly incapacity benefits), or the identity of its recipient, operates to free the insurer from the obligation of paying § 50 interest when it is subsequently ordered to make *any* further payment on that claim. Accordingly, if an insurer, in response to an employee's claim for benefits under §§ 30,<sup>11</sup> 34, or 35, pays a hospital bill for emergency room treatment, and a subsequent conference order directs payment of any additional benefits under §§ 30, 34, or 35, no interest is due. Logically, in the insurer's view, the same result would obtain if it paid one day of partial incapacity benefits in response to the employee's claim, but was later ordered, on that claim, to pay ongoing incapacity benefits retroactive to the date of injury. We are unconvinced the legislature intended such results, particularly where the general purpose of

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<sup>10</sup> General Laws c. 152, § 50, provides:

Whenever payments of any kind are not made within sixty days of being claimed by an employee, dependent or other party, and an order or decision requires that such payments be made, interest at the rate of ten percent per annum of all sums due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment.

<sup>11</sup> General Laws c. 152, § 30, provides, in pertinent part:

The insurer shall furnish to an injured employee adequate and reasonable health care services, and medicines if needed, together with the expenses necessarily incidental to such services. . . .

providing for interest payments on awards is to compensate the claimant for the loss of use of his money. "Interest is awarded by law so that a person wrongfully deprived of the use of money should be made whole for [her] loss." Todino v. Town of Wellfleet, 448 Mass. 234, 239 (2007), quoting Perkins Sch. for the Blind v. Rate Setting Comm'n, 383 Mass. 825, 835 (1981).

The employee urges us to construe the phrase, "payments of any kind," to mean that interest is due on later payments ordered which were not previously paid within the sixty day period.<sup>12</sup> In other words, the legislature's use of the plural, "payments," as opposed to "payment," supports the view that it envisioned scenarios where insurers would pay some, but not all, of the benefits claimed due. Its use of the phrase "payments of any kind," coupled with its directive, in the section's last sentence, that when "such sums include weekly payments, interest shall be computed on each unpaid weekly payment," is further evidence that the legislature intended retroactive awards of compensation, insofar as they exceed periods of previously paid compensation, to be paid with interest. We view our interpretation of the statute as consistent with "the over-all objective the Legislature sought to accomplish." National Lumber Co. v. LeFrancois Constr. Corp., 430 Mass. 663, 667 (2000).

We conclude the insurer's prior payment of compensation did not alter the nature of the funds paid pursuant to the conference order as a "payment[] of any kind" that had not been made within sixty days of being claimed by the employee. As such, interest was due on the \$7,729.32 awarded at conference. In other words, we read the qualification for payment of § 50 interest, "[w]henever payments of any kind are not made within sixty days of being claimed," to include any payment not made within the sixty day time frame which is later ordered. Here, *some* "payments of any kind" in fact were "not made within sixty days of being claimed by the employee," namely, the additional retroactive benefits ordered as a result of the

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<sup>12</sup> We note that under § 50, if an insurer fails to make all payments claimed by the employee within sixty days of its receipt of same, and wishes to avoid paying interest, it may simply voluntarily pay the benefits due prior to being ordered to do so.

December 5, 2005 conference. The insurer was obligated to pay § 50 interest on that amount, because the conference order specifically required it to do so.

The insurer is ordered to pay the § 50 interest due on the benefits ordered by way of the § 10A conference, which accrues until payment under this decision. See footnote 3, supra. Because the insurer did not pay the interest ordered on the \$7,729.32 awarded at conference, a § 8(1) penalty is also due.<sup>13</sup> [13] See McCarthy v. M.B.T.A., 66 Mass. App. Ct. 541, 547 (2006); Favata v. Atlas Oil Co., 12 Mass. Workers' Comp. Rep. 12 (1998); compare Johnson's Case, 69 Mass. App. Ct. 834, 839 (2007)(where § 50 interest not mentioned in order or decision, no § 8(1) penalty for insurer's failure to pay such interest). Accordingly, we order the insurer to pay the employee a penalty in the amount of \$10,000 for its failure to pay the interest due for more than ninety days from the insurer's receipt of the December 2005 conference order. See footnote 1, supra.

Because the employee, and not the insurer, appealed the hearing decision, and the employee has prevailed, in part, an attorney's fee is due under G. L. c. 152, § 13A(7). That section provides, in pertinent part: "[s]ubject to the approval of the reviewing board, such fee shall be an amount agreed to by the employee and his attorney." Accordingly, employee's counsel is directed to submit to this board, for review and approval, a duly executed fee agreement between counsel and the employee. No fee shall be due and collected from the employee unless and until said fee agreement is reviewed and approved by this board.

So ordered.

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Mark D. Horan  
Administrative Law Judge

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<sup>13</sup> We note the insurer could have avoided the imposition of a § 8(1) penalty by paying the interest due within fourteen days of the conference order, and preserving the § 50 issue on appeal. See General Laws c. 152, § 12(1).

**Paul S. Sloan, Jr**  
**Board Nos. 007466-05, 030138-05**

Patricia A. Costigan  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

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