COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 003702-00

Peter J. Megazzini	Employee
Bell Atlantic	Employer
Verizon New England, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Carroll)

APPEARANCES
Bernard J. Romani, III, Esq., for the employee
Karen S. Hambleton, Esq., for the self-insurer

FABRICANT, J. The employee appeals from a decision in which an administrative judge denied his claim for penalties pursuant to G. L. c. 152, § 8(1) for non-payment of interest due pursuant to G. L. c. 152, § 50 from a previous hearing decision. Because we find that G. L. c. 152, § 8(1) applies only to payments due an employee under the specific terms stated in an order or decision, and because the prior hearing decision did not specifically award interest pursuant to G. L. c. 152, § 50, we affirm the decision of the administrative judge denying the employee's claim for penalties.

Following a §10A conference, the judge awarded a closed period of §34 temporary total incapacity benefits ending September 29, 2000. The employee appealed and the case came before the same administrative judge for a full evidentiary hearing pursuant to § 11. The resulting decision, filed on November 19, 2001, awarded continuing benefits pursuant to § 35 from September 29, 2000. (Dec. 6). At the employee's request, the administrative judge filed a corrected decision on February 7, 2002, ordering the self-insurer to pay interest pursuant to G. L. c. 152, § 50. The parties stipulated that the self-insurer did not make any interest payments until after the corrected decision was filed, and that payment pursuant to § 50 was received by the employee on February 22, 2002. (Dec. 4).

The employee contends that the self-operative nature of § 50[1] requires that a penalty be assessed against the self-insurer pursuant to G. L. c. 152, § 8(1)[2] for failure to make any payment of interest to the employee at the time the original decision was filed on November 19, 2001. However, by itself, the self-operative nature of § 50 does not trigger the requirement for an assessment of penalties pursuant to § 8(1). The plain language of § 8(1) requires that a penalty be assessed only where an insurer fails to make payments *due under the terms of an order or decision*. If the order or decision does not specify that payment is due pursuant to § 50, or any other statute, no § 8(1) penalty may be assessed for failure to make such payment.[3]

The fact that interest pursuant to § 50 is not specifically awarded in the decision of November 19, 2001, distinguishes this case from Favat a v. Atlas Oil Co., 12 Mass. Workers' Comp. Rep. 12 (1998), which is cited by the employee as requiring a penalty award pursuant to § 8(1). Pacellini v. Cape Cod Fireplace Shop, 17 Mass. Workers' Comp. Rep. 394 (2003), which denied a § 8(1) penalty for an insurer's failure to timely reimburse the prevailing employee for her share of the § 11A examination fee, is instructive:

> We note that in Favata. . . cited by the dissent for the proposition that the "selfoperative" nature of § 50 invites a § 8(1) penalty when interest is not timely paid, the insurer's culpable omission was failure to pay interest *explicitly awarded* in a § 10A conference order of weekly compensation. No self-operation of the statute was involved as the "terms" of the order required payment of interest. The reviewing board reversed the administrative judge's denial of the penalty, holding that § 50 interest is a "payment due the employee" under § 8(1). Citing Diaz [9

[1] In Le v. Boston Steel & Mfg. Co., 14 Mass. Workers' Comp. Rep. 75 (2000), we held that § 50 is self-operative.

[2] G. L. c. 152, § 8 (1) requires an assessment of penalties in the event of "…[a]ny 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, or certified letter notifying said insurer that the employee has left work after an unsuccessful attempt to return within the time frame determined pursuant to paragraph (a) of subsection (2) of [§ 8]."

[3] However, the failure of an order or decision to specify that payments are due does not absolve an insurer or self-insurer from compliance with a statute that is self-operative. Failure to comply with such a statute without reasonable grounds could subject the insurer or self-insurer to penalties pursuant to G. L. c. 152, § 14 (1).

> Mass. Workers' Comp. Rep. 528] at 533, the board stated that "the language of § 8(1), 'payments due the employee,' means what it says: *amounts that are required by an order, decision, etc., to be paid directly to the employee.* Favata, s upra at 14.

Pacellini, supra at 405-406 (emphasis in original).

This principle is further reinforced in *Cruthird v. City of Boston Health & Hospital Dept.*, 17 Mass. Workers' Comp. Rep. 421 (2003), in which we concluded that failure to make timely payment of COLA benefits, even though due "without application" under the very terms of § 34B, did not trigger § 8(1), because the § 10A conference order

did not include a specific order of COLA benefits. Thus, having timely paid the § 34A weekly benefits which were ordered, there was no other term with which the self-insurer failed to comply so as to render it subject to a § 8(1) penalty.

Id at 423.[4]

Accordingly, the decision of the administrative judge denying the employee's claim for penalties pursuant to G. L. c. 152, § 8(1), is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

[4] Cruthird also properly notes that "penalty statutes must be narrowly applied," citing Collatos v. Boston Retirement Bd., 396 Mass. 684 (1986). See also Montleon v. Mass. Dept. of Public Works, 16 Mass. Workers' Comp. Rep. 354 (2002), which concluded that the reinstitution of benefits after a 15% reduction for failure to pursue vocational rehabilitation, when not timely made, does not trigger a § 8(1) penalty, because the notification of such reinstitution is not a § 8 (1) document, receipt of which sets the § 8 (1) meter running.

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Martine Carroll
Administrative Law Judge

Filed: June 10, 2005