COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 046676-03**

Reginald Eason	Employee
Symmetricom Corp.	Employer
North River Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Levine)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing and on appeal
James N. Ellis, Esq., for the employee on appeal
James P. McKenna, Esq., for the insurer at hearing
David M. O'Connor, Esq., and Joseph C. Abate, Esq., for the insurer on appeal

FABRICANT, J. The parties cross-appeal from a recommittal decision in which the administrative judge denied the employee's § 36 claim, but awarded closed periods of § 35 benefits, and a § 8(1) penalty for the insurer's failure to make timely payments due the employee in the prior decision. We summarily affirm the decision as to all issues argued by both sides, with the exception of the insurer's argument against the imposition of the § 8(1) penalty. We reverse the penalty award as ordered in the decision, but conclude, for other reasons, that a penalty is due as a matter of law. We recommit the case for further findings on the amount of that penalty.

This case first came before the reviewing board when the insurer appealed a decision awarding the employee ongoing § 35 benefits. The reviewing board recommitted the case for further findings on the employee's earning capacity. Eason v. Symmetricom Corp., 21 Mass. Workers' Comp. Rep. 123 (2007). While that recommittal was pending, the employee brought another claim seeking, *inter alia*, a § 8(1) penalty for the insurer's alleged failure to make timely payments due to him in the original decision. The judge joined that claim with the recommittal, and after a hearing, awarded the § 8(1) penalty claimed. It is that award which we now address.

The pertinent provision of § 8(1) states:

> Any failure of an insurer to make all payments due an employee under the terms of an order [or] decision . . . within fourteen days of the insurer's receipt of such document, shall result in a penalty of two hundred dollars . . . 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.

General Laws c. 152, § 8 (1).

The employee alleged that the insurer failed to pay the full amount of the retroactive § 35 award in the original decision and the full amount of ongoing § 35 benefits due. As to the former, the judge found that the insurer's retroactive payment to the employee actually exceeded what was due:

> My original decision directed the insurer to pay to the employee Section 35 benefits on a continuing basis commencing on December 20, 2003 at the weekly rate of $141.99 and to pay Section 50 interest at 10% on those benefits. That award involved a retroactive payment and ongoing weekly benefits. The controversy arose when the insurer issued to Mr. Eason payment of the retroactive portion of the award from which it deducted an amount in response to an existing [Dept. of Revenue] child support lien. However, the insurer miscalculated the required deduction and paid Mr. Eason significantly in excess of the amount to which he was entitled, i.e., the decision award less the DOR lien. (See Exhibit 12.)

(Dec. 18.) The insurer then resorted to self-help in an attempt to remedy its mistake:

> Having then discovered the problem, the insurer sought to correct the overpayment by foregoing weekly benefits it would have paid otherwise to Mr. Eason. (See Exhibit 10.) The employee alleged that the insurer failed to make the weekly payments required by the strict terms of my decision.

(Dec. 18.)

The judge found that instead of the insurer's initial timely payment to the employee of $12,992.08 for the retroactive award, the insurer should have paid the employee only $3,231.58. That lower amount represents the difference between the judge's actual retroactive § 35 award (with interest) of $19,480.33, and $16,248.75,

the amount that should have been (but was not) paid directly to the Massachusetts Department of Revenue (DOR) for the employee's child support arrearage. (Dec. 19-20.) See § 46A.[1] The judge concluded: "I find that the insurer paid Mr. Eason in excess of the balance due to him by the terms of my decision award and, therefore, there was no violation and no penalty is due as to the retroactive payment." (Dec. 20.)

However, the judge did assess a § 8(1) penalty based on the insurer's unilateral withholding of ongoing § 35 payments as recoupment for its retroactive overpayment to the employee, finding "the insurer had no authority to recoup funds unilaterally from Mr. Eason and, having done so, it violated the specific provisions of Section 8(1) which must result in a penalty to Mr. Eason." (Dec. 22.)

The judge erred in assessing the § 8(1) penalty on that basis. The insurer's unilateral reduction of payments of ongoing weekly partial incapacity benefits ordered in the decision, while illegal, does not support a § 8(1)[2] penalty as a matter of law. Rather, the insurer's action is in the nature of an illegal discontinuance because it

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[1] Section 46A provides, in pertinent part:

> If an employee owes past-due child support that is subject to a lien pursuant to section six of chapter one hundred and nineteen A, the IV-D agency may, at any time before an award of worker's compensation benefits is paid or approval of a lump sum benefit is given or any other nonperiodic compensation is made pursuant to this chapter, file with the division a claim for past-due child support out of the proceeds of such award or lump sum settlement or other nonperiodic compensation. In those instances in which a claim is filed and upon satisfactory proof, the division or a member thereof shall order direct payment of the past-due child support to be made from such award or lump sum or other nonperiodic compensation to the IV-D agency on behalf of the obligee to whom past-due support is owed. Such direct payment shall be made before payment of any claim of the department of transitional assistance and any claim of the division of medical assistance. The provisions of sections 6 and 17 of chapter 119A shall constitute the sole remedy for an employee to contest a lien for past due child support.

[2] Section 8(1) prescribes penalties for "[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 fourteen days of the insurer's receipt of such document . . . . "

lacks the predicate § 8(1) "document" from which to begin the fourteen day timely payment period. As the Appeals Court reasoned in Figueiredo's Case, 49 Mass. App. Ct. 906 (2000), in denying the assessment of a § 8(1) penalty: "[R]ather than improperly failing to *start* timely . . . benefits, which § 8(1) penalizes, here [the insurer] improperly discontinued . . . Figueiredo's benefits . . . ." Id. at 907. See also O'Brien v. Franklin Sports, Inc., 17 Mass. Workers' Comp. Rep. 285, 287 (2003); Bernier v. LaBaron Foundry, Inc., 16 Mass. Workers' Comp. Rep. 331, 332 (2002).

We see the present case as indistinguishable from Figueiredo. Accordingly, we conclude the award of the § 8(1) penalty assessed for the insurer's illegal reduction and recoupment of weekly benefit payments is contrary to law.

However, that is not the end of our analysis. The employee argues that the insurer's payments on the retroactive award of $19,480.33 actually did not exceed that amount. Instead, the employee disregards (but does not dispute) the $16,248.75 which the insurer should have paid directly to DOR, and points to a $210.13 shortfall in the total amount the insurer paid toward the $19,480.33. The employee refers to the $12,992.08 paid to him on May 4, 2006, and an additional $6,278.12 paid to him on May 25, 2006,[3] equaling $19,270.20. (Dec. 20; Ex.10.) The employee contends this $210.13 shortfall independently supports the § 8(1) penalty award.

The insurer argues that the retroactive award cannot be the source of a § 8(1) penalty because it actually overpaid the employee with proceeds that were not "due to the employee," but which should have been paid directly to DOR to pay the child support lien. We reject the insurer's position and agree, in part, with the employee.

There is no dispute that the insurer did not pay the entire amount of the retroactive benefits award, either to the employee or DOR or both, within the fourteen day period designated in § 8(1), thereby triggering the possibility of the maximum $10,000 penalty. The fact that the ultimate destination of the payment was DOR, and

[3] For the purposes of this discussion we need not be concerned with the fact that even that amount was not really paid within the required fourteen days, as the second installment, $6,278.12, was already late and within the first $200.00 penalty stage of the § 8(1) schedule.

not the employee, does not mean that this payment was not "due [the] employee." It is the *employee's* obligation that the insurer satisfies with its direct payment to DOR pursuant to § 46A. Here, the insurer failed to make payment to DOR, paying DOR's share to the employee instead. The practical effect of an insurer's failure to pay DOR promptly for the lien is that interest continues to accrue and penalties continue to be assessed against the employee for non-payment of the child support arrearage.[4] See G. L. c. 119A, § 6(b)(7)(cross-referenced in § 46A); G. L. c. 62C, § 32(rate of interest is federal short term interest rate plus four percentage points). Thus, even if the outstanding DOR lien is eventually satisfied, the original amount of the lien will have increased, causing the employee to incur more out-of-pocket expense. Cf. Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528, 532-533 & n.4 (1995)(§ 8(1) penalty provision, "all payments due to the employee," construed as inapplicable to payment of § 30 medical benefits to provider; amounts paid by employee out-of-pocket, however, could support penalty if not timely reimbursed by insurer). Here, the total payments were less than the amount awarded, thereby triggering the § 8(1) penalty for the insurer's failure to make *all payments due* within fourteen days of the hearing decision.

However, Exhibit 10 lists payments purportedly made by the insurer. It is a question of fact as to which of those payments were made toward the retroactive award.[5] Accordingly, we recommit the case for further findings of fact regarding the amount of the § 8(1) penalty to be assessed.

The insurer shall pay counsel for the employee an attorney's fee, pursuant to G. L. c. 152, § 13A(6), in the amount of $1,488.30.

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[4] While it is the employee's obligation to pay the DOR lien, the insurer's failure to pay the DOR lien pursuant to an order places new burdens upon the employee to discover, assess and, ultimately, correct the insurer's error. Penalties and interest will continue to accrue during this time, thus increasing the lien obligation.

[5] If payments are found to have satisfied the retroactive award sooner than ninety days, the penalty due pursuant to the statute may be considerably less than the maximum $10,000. See G. L. c.152, § 8(1).

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: