

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
INDUSTRIAL ACCIDENTS

BOARD NO. 008401-99

Robert Castaneda
Modern Continental Construction Co.
National Union Fire Ins. Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Costigan and Horan)

APPEARANCES

Gerard B. Carney, Esq., for the employee
Edward F. McGourty, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision awarding the employee a § 8(1) penalty for its failure to timely pay interest expressly awarded in a corrected § 10A conference order filed on June 2, 2000. Because the insurer's appeal is based upon the erroneous assertion that the employee failed to file a proper affidavit in support of his claim for the § 8(1) penalty, we affirm the decision.

The facts underlying the employee's industrial injury are not relevant to the issue of the § 8(1) penalty that is the subject of this appeal. When the judge ordered that the insurer pay weekly incapacity benefits and § 50 interest, (Dec. 622-623), the insurer was obligated to pay not only the weekly benefits, but also the § 50, interest within fourteen days of its receipt of the order. See G. L. c. 152, § 8(1).¹

When the insurer did not pay the interest due, the employee notified the insurer of its omission, and joined a § 8(1) penalty claim to the de novo hearing on the underlying benefit entitlement. See Favata v. Atlas Oil Corp., 12 Mass. Workers' Comp. Rep. 12

¹ 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 . . . 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 . . . ten thousand dollars if not made within ninety days.

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(1998). When the judge and the parties convened for that hearing, they were unable to locate an affidavit signed by the employee's counsel, as required by 452 Code Mass. Regs. § 1.07(2)(b),² within the department's file. (Dec. 623.) In his October 31, 2002 decision, the judge determined that a penalty for the insurer's failure to pay interest ordered at conference would indeed be due, were it not for the employee's failure to file the requisite affidavit with his penalty claim. For that reason, the judge denied the penalty, but added, "[t]his ruling does not prevent the employee from filing a section 8(1) claim that complies with 452 C.M.R. 1.07(2)(b)." (10/31/02 Dec. 617, n.1.)

Consistent with the judge's ruling, the employee filed a subsequent § 8 (1) penalty claim, and after a second hearing before the same judge, the employee was awarded a \$10,000 penalty for the insurer's failure to make a timely payment of § 50 interest under the June 2, 2000 conference order. (Dec. 629.)

The insurer's appeal to the reviewing board asserts that the judge had no authority to deny the employee's initial § 8(1) claim without prejudice, and that the second hearing decision on the matter was therefore a nullity under the principles of *res judicata*. The insurer does not argue the underlying merits of the § 8(1) award.

We need not address the propriety of the judge's decision denying the employee's § 8(1) claim without prejudice, because that ruling was based upon an incorrect view of what documentation the employee had previously filed. Our review of the board file uncovered a signed affidavit, in compliance with the regulation, which was date stamped as received by this agency on December 5, 2001. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of contents of board file). Since the insurer's original procedural objection was therefore invalid, *ab initio*, we consider its continuing objection, for the same reason, to the validity of further proceedings similarly without merit. The matter is akin to a scrivener's error,

² 452 Code Mass. Regs. § 1.07(2)(b), provides that "[c]laims for penalties under M.G.L. c. 152, § 8(1) shall be accompanied by a copy of the order . . . with which it is alleged the insurer has failed to comply, together with an affidavit signed by the claimant or the claimant's attorney attesting to the date payment was due, the date, if any, on which payment was made, and the amount of penalty the claimant is owed."

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but one that is the responsibility of the department as a whole, not just the administrative judge.

We therefore affirm the decision awarding the § 8(1) penalty. We award counsel for the employee a fee under the provisions of § 13A(6) in the amount of \$1,357.64 .

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: *June 6, 2006*