

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 011535-11

Roberto Fernandez
State Street Development
U.S. Fire Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Calliotte)

The case was heard by Administrative Judge Benoit.

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing and on appeal
Nicholas J. Ellis, Esq., for the employee on appeal
Joseph R. Conte, Esq., for the insurer at hearing
Christopher L. Maclachlan, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision denying and dismissing his claims for §§ 8(1)¹ and 14(1)² penalties. We affirm the decision.

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, decision . . . 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. . . .

² General Laws, c. 152, § 14(1), provides, in pertinent part:

[i]f any administrative judge or administrative law judge determines that any proceedings have been brought, prosecuted, or defended by an insurer without reasonable grounds:

(a) the whole cost of the proceedings shall be assessed upon the insurer; and

(b) if a subsequent order requires that additional compensation be paid, a penalty of double back benefits of such amount shall be paid by the insurer to the employee. . . .

The employee suffered a compensable injury and claimed loss of function and disfigurement benefits pursuant to §§ 36(h) and (k), respectively. On January 10, 2012, a conference order awarded the employee § 36 benefits totaling \$7,930.91, plus interest; pursuant to § 13A, an attorney's fee in the amount of \$1,517.62 was also awarded. The conference order further provided that "the insurer may withhold the employee's share of the attorney's fee in accordance with the provisions of § 13A(10) and the relevant provisions of 452 C.M.R. 1.02."³ Consequently, the insurer reduced the employee's § 36 benefit award by the amount of the attorney's fee. The employee did not appeal the January 10, 2012 conference order. (Dec. 3, 5.)

On July 30, 2013, the Supreme Judicial Court, in Spaniol's Case, held that:

[A]n award of compensation under § 36 for specific injuries is not subject to an offset for an attorney's fee pursuant to § 13A (10), [and] the definitions of "cash award" and "amount payable to the employee within the first month from the date of the voluntary payment, order or decision," as promulgated by the commissioner, are not in harmony with the legislative mandate. Consequently, these definitions must be deemed void insofar as they encompass compensation for specific injuries pursuant to § 36.

466 Mass. 102, 111. "On or about October 4, 2013, the employee filed a new claim seeking § 8(1) penalties and § 13A attorney's fees." (Dec. 3.) On January 23, 2014, the judge denied the claim at conference; the employee appealed. (Dec. 2-3.)

³ General Laws c. 152, § 13A(10), provides, in pertinent part:

In any instance in which an attorney's fee . . . is due as a result of a cash award being made to the employee . . . pursuant to an order or decision, the insurer may reduce the amount payable to the employee within the first month from the date of the voluntary payment order or decision, by the amount owed the claimant's attorney. . . .

452 Code Mass. Regs. § 1.02, provides, in pertinent part:

Cash Award as used in M.G.L. c. 152, §13A(10), shall mean any specific compensation benefits payable under M.G.L. c. 152, §36 . . . and any weekly benefits payable under M.G.L. c. 152 of an amount that exceeds the weekly amount being paid the employee for the week immediately prior to the date of the voluntary payment, order or decision.

At hearing, and on appeal, the employee argues that when Spaniol was decided in 2013, the insurer violated § 8(1), and § 14(1), by failing to promptly reimburse the employee the amount of the attorney's fee withheld pursuant to the January 10, 2012 conference order. The judge disagreed, reasoning that the employee's failure to appeal that conference order, which expressly allowed the insurer to offset the § 36 benefit award by the amount of the attorney's fee ordered, doomed his claim for penalties. (Dec. 5-6, 8.)

We agree with the judge. Because the January 10, 2012 conference order specifically authorized the insurer to withhold the attorney's fee from the § 36 benefit award, and the employee did not appeal that order, he accepted it. G. L. c. 152, § 10A(3);⁴ Giraldo's Case, 85 Mass. App. Ct. 1109 (2014)(Memorandum and Order Pursuant to Rule 1:28)(rejecting argument that unappealed conference order should not be given preclusive effect); Blanco v. Alonso Constr., 26 Mass. Workers' Comp. Rep. 157, 160 n.6 (2012)(and cases cited). Thus, the employee's § 36 claim was resolved long before the court, in Spaniol, changed the law. And there can be no retroactive application of a change in the law "to a case which has been closed, i.e., has gone to judgment and either been affirmed on appeal or not been appealed within the time allowed for appeal." City Council of Waltham v. Vinciullo, 364 Mass. 624, 627 (1974), quoted in Heider v. Heider, 34 Mass. App. Ct. 634, 636 (1993). There was no error.

The decision is affirmed.⁵

So ordered.

⁴ General Laws c. 152, § 10A(3), provides, in pertinent part:

Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings. . . .

⁵ In light of our decision, we do not address the employee's remaining argument, to wit: that the judge erred by denying the employee's Motion to Certify Class Action, and that Spaniol created a new independent right to a § 8(1) penalty.

Roberto Fernandez
Board No. 011535-11

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: **February 12, 2016**