COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 027092-04**

Scott A. Murphy	Employee
American Steel & Aluminum	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Costigan and Levine)[1]

The case was heard by Administrative Judge Benoit.

APPEARANCES
Charles E. Berg, Esq., for the employee
Robert J. Riccio, Esq., for the insurer
Holly B. Anderson, Esq., for the insurer on appeal

KOZIOL, J. The employee appeals from a decision in which the administrative judge denied his claim for a late payment penalty under the provisions of § 8(1),[2] after concluding that the employee "received the full amount of § 36 benefits and § 50 interest to which he was entitled."[3] We affirm in part and reverse in part.

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[1] This case was originally assigned to a panel comprised of Judges Fabricant, Koziol and Levine. Judge Fabricant, however, recused himself and did not participate in panel deliberations.

[2] 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 . . . ten thousand dollars if not made within ninety days.

[3] 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

The employee filed his § 36 claim on July 20, 2007. Pursuant to an April 27, 2009, hearing decision, the insurer was ordered to pay the employee $22,310.87 in § 36 benefits. The insurer had not paid any amount of the claimed benefits prior to April 27, 2009. On May 5, 2009, the insurer paid both the principal due on the § 36 award, after reducing the award to $17,402.42, for payment of attorney's fees pursuant to § 13A(10), and $3,759.90 in § 50 interest, which it calculated based upon the full amount of the § 36 award, $22,310.87. The insurer used the department's § 50 interest calculator to determine the amount of interest due. Because it was a one time payment, the insurer arrived at the $3,759.90 amount by inserting one date, 01/01/00, as both the beginning and end dates for the § 36 award. (Dec. 2-3.)

The employee filed the present claim for a § 8(1) late payment penalty, based in part on the alleged failure of the insurer to make full payment of § 50 interest within ninety days.[4] See Sloan's Case, 78 Mass. App. Ct. 121, 125 (2010). The case was tried on stipulated facts, including that the insurer based its payment of interest on a screen printout from the department's § 50 interest calculator. (Dec. 2.) The employee alleged that as a matter of arithmetic, the $3,759.90 interest payment underpaid by $248.26, the § 50 interest due on

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include weekly payments, interest shall be computed on each unpaid weekly payment.

[4] The employee also alleged that the insurer erred in applying § 13A(10) to his § 36 award and that 452 Code Mass. Regs. § 1.02's definition of "cash award" should not be applied in this case. We summarily affirm on those issues. Vazquez v. Target Corp., 23 Mass. Workers' Comp. Rep. 359, 365 (2009)(regulation's inclusion of § 36 benefits in definition of "cash award" appearing in § 13A(10) is valid as a "legitimate counter-balance to the 'first thirty days of future weekly benefits restriction' "), aff'd Vazquez's Case, 78 Mass. App. Ct. 1112 (2010)(Memorandum and Order Pursuant to Rule 1:28); Grogan's Case, 78 Mass. App. Ct. 1132 (2010)(insurer may offset § 36 award payment by 22% for contribution to a portion of attorney's fee, pursuant to § 13A(10) and 452 Code Mass. Regs. § 1.02, rev. den., 457 Mass. 1108 (2010).

$22,310.87.[5] He argued that by using an arbitrary start and end date on the department's online interest calculator, the insurer improperly manipulated the calculator, and the result obtained there from could not be used. (Dec. 2.) Because the parties disputed the amount of interest due the employee on the § 36 award,[6] the judge looked to the relevant regulations pertaining to the term "interest" appearing in the department's adjudicatory rules:

> "Interest" as used in M.G. L. c. 152, § 50, shall be calculated using the Department-provided formula available on its website. The parties may utilize other formulas but when a discrepancy exists the amount of interest in the Department formula will prevail for all purposes.

452 Code Mass. Regs. § 1.02. The judge denied and dismissed the employee's claim, concluding that the insurer's use of the department's § 50 interest calculator immunized the insurer from the underpayment and penalties claim.[7] The judge found:

> As must be obvious to even the most casual observer, [the employee's claim of improper manipulation of the calculator] is nonsensical. Had the Insurer actually used January 1, 2000 as the date on which interest began to run, the result would have reflected more than nine years' of interest, an amount much higher than the actual amount due for a 656-day period. The "01/01/00" entries on Exhibit [sic] refer to *start* and *end* dates for *periodic*

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[5] The employee's brief includes the calculation. (Employee br. 10.) Although the insurer's brief does not address the calculation, we discuss the calculation infra.

[6] The insurer never accepted the employee's formula for calculating interest as being accurate, and relied solely on the Department's interest calculator to determine the amount of interest due. (Ins. br. 3.)

[7] Read in context, the regulation's use of "shall" is not a mandate, as the regulation goes on to expressly allow the parties to "utilize other formulas." See McCarty v. Boyden, 275 Mass. 91, 93 (1931)(although "shall" "commonly imports an imperative order," context of its use can point to "permissive or directory" usage). The regulation nonetheless not only invites the use of the interest calculator by its "safe harbor" provision in the second sentence, but also provides absolute immunity from claims of underpayment and penalties under § 8(1) when it has been used. See Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth, 460 Mass. 647, 669 (2011) (discussing import of regulatory safe harbor provision).

> *payments*, a concept that is inapplicable to an award of § 36 benefits. Those entries played no part in the calculation of the amount owed.

(Dec. 2-3; emphasis original.)

On appeal, the employee argues the judge erred in denying the claimed § 8(1) penalty on the underpayment of § 50 interest. The insurer counters that the judge was correct to find its reliance on the interest calculator triggered the regulation's presumption of accuracy, thereby barring a finding of an underpayment and thus, a § 8(1) penalty. We are not persuaded by either party's argument.

Although 452 Code Mass. Regs. § 1.02 does assert the primacy of a calculator-based interest determination, this presupposes that accurate data is entered. The judge's finding that the date used by the insurer "played no part in the calculation of the amount owed," however, is correct insofar as the entry of *any one* date for both the beginning and end of the interest period yields the same amount, $3,759.90.[8] (Dec. 3). However, that finding does not address the operative fact, alluded to by the judge but not expressly recognized or discussed in his decision: the calculator was designed to figure interest due on *periodic payments*, such as where the award is for weekly incapacity benefits, but it cannot be used to figure interest due on a *one-time* award of § 36 benefits. Indeed, had the insurer entered the actual beginning and end dates of the period for which § 50 interest was due, the calculator would have yielded a total due in excess of *two million dollars*, which is clearly wrong. See footnote 8, supra.

The employee advocates for the use of a "calculation of simple interest at 10 per cent per annum, on $22,310.87 for the period from July 20, 2007 to May 5, 2009." (Employee br. 4.) In performing that calculation, the employee a)

[8] We take judicial notice of this fact pursuant to Massachusetts Guide to Evidence § 201(b)(2008), which provides, in pertinent part: "A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned."

determined yearly interest due, rounded to the nearest cent, and b) divided that product by 365.25 days, presumably taking into account the effect of a leap year every four years, in order to arrive at the per diem interest due. The employee then, c) multiplied the per diem interest by the number of days in order to arrive at the total interest due:

a. $22,310.87 at 10% per annum is $2,231.09

b. $2231.09 divided by 365.25 days per year = $6.11 per diem interest

c. $6.11 times 656 days = $4,008.16

Id. The employee correctly maintains that his method of calculating interest on this one-time payment results in a total interest payment that is $248.26 more than the interest paid by the insurer. While the insurer expressly does not accept the accuracy of the employee's calculation, the parties stipulated to all of the operative factors contained in that calculation: the total amount of the § 36 award, the time period in dispute, June 20, 2007 to May 5, 2009, and the total number of days represented by that time period, 656. (Dec. 2.) The insurer offers no alternative formula for calculating interest on a one-time payment; it states only that the department's interest calculator's result must be accepted as proper pursuant to 452 Code Mass. Regs. § 1.02.

As a matter of simple arithmetic, the employee's method of calculation yields an accurate amount of interest due on the award and illustrates the short-comings of the department's interest calculator. Because the interest calculator does not function properly for calculating interest on a one-time § 36 award, the result obtained by its use where this one-time payment was due cannot be accorded deference despite the regulation's mandate. This is because the presumption of accuracy in the interest-calculator regulation conflicts with, and yields an amount less than, the proper calculation of § 50 interest on a one-time § 36 benefit award.[9] Because "the application of . . . section [50] of this chapter

[9] The interest calculator is being updated to include the capacity to compute interest on one-time payments such as § 36 awards.

[is] . . . made impossible by the enforcement of" the regulatory definition of "Interest," 452 Code Mass. Regs. § 1.02 must be deemed unenforceable in this particular case. G. L. c. 152, § 5. See Corriveau v. Home Ins. Co., 43 Mass. App. Ct. 924, 925 (1997). See attached Appendix (§ 5 letter informing department director of "the explicit contradiction found between the regulation and this chapter").

For the same reason, however, a § 8(1) penalty is not payable for the underpayment resulting from use of the department's calculator. Because the regulation not only invited reliance on the department's interest calculator but provided specific "safe harbor" language guaranteeing that the department formula "will prevail for all purposes" where a discrepancy exists, a statutory penalty equitably may not be premised on the calculator's deficiencies, which yielded an erroneous result. Such circumstances are wholly outside of the responsibility of the insurer who relied upon the regulation and otherwise made the interest payment prescribed by the calculator in a timely fashion.

> The $10,000 penalty under § 8(1), par. 2, is in the nature of a penal statute. This penalty does not provide restitution to the employee, but penalizes a late payment even though . . . the insurer may eventually make that payment to the employee. See Eastern Cas. Ins. Co. v. Roberts, 52 Mass. App. Ct. 619, 629, 755 N.E.2d 776 (2001)("the penalty provisions [of G.L. c. 152, § 8(1)] . . . are enacted not to confer rights on employees, but instead to persuade insurers to make timely payments").

Johnson's Case, 69 Mass. App. Ct. 834, 838-839 (2007).

Accordingly, we reverse the decision with respect to the amount due under § 50, and order the insurer to pay the additional $248.26 claimed by the employee, as the total amount of the § 50 interest due was $4,008.16 rather than the $3,759.90 paid. (Employee br. 10.) We affirm the denial of the § 8(1) penalty. Because this reversal of a portion of the hearing decision means the employee "prevail[ed] at such hearing," we order the insurer to pay a § 13A(5) hearing fee, in the amount of $5,209.00, the standard base hearing fee on the date of the

decision, February 10, 2011.[10] See Buduo v. National Grange Ins. Co., 24 Mass. Workers' Comp. Rep. 101, 109 (2010), aff'd Buduo's Case, 79 Mass. App. Ct. 1114 (2011) (Memorandum and Order Pursuant to Rule 1:28).

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: ***June 21, 2012***

[10] Circular Letter 336, issued October 6, 2010 and in effect on the date this decision was filed, increased the legal fee due an employee's attorney to $5,209.00. General Laws c. 152, § 13A(10)(providing for the yearly adjustment of attorney's fees payable under § 13A (1)-(6) on October first of each year).