COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 053814-88**

Steven Montleon	Employee
Massachusetts Department of Public Works	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Levine, and Carroll)

APPEARANCES
Thomas H. O'Neill, Esq., for the employee
Marian C. Grimes, Esq., for the self-insurer

MCCARTHY, J. The employee appeals an administrative judge's denial of his penalty claims under §§ 8(1) and 8(5), and alleges that the judge failed to address his claim for supplemental cost of living (COLA) benefits under § 35F. We affirm the judge's decision denying the § 8(1) penalty, but recommit the case for the judge to address the employee's claim for a § 8(5) penalty and his COLA claim.

Steven Montleon sustained an industrial injury in 1988. The self-insurer accepted the case and paid § 34 temporary total incapacity benefits to exhaustion in 1993, and § 35 temporary partial incapacity benefits thereafter. (Dec. 2.) He became eligible for COLA benefits under § 35F as of October 1, 1993. (Dec. 3.) On December 15, 1993, the Office of Education and Vocational Rehabilitation (OEVR) found the employee suitable for vocational rehabilitation. Subsequently, the self-insurer alleged that the employee failed to cooperate by refusing vocational services, and requested that OEVR authorize a fifteen percent reduction in weekly benefits.[1] OEVR allowed the reduction, and the self-insurer reduced the employee's weekly § 35 benefits effective November 18, 1994. (Dec. 2.)

[1] General Laws c. 152, § 30G, reads, in relevant part:

> An insurer may reduce by fifteen percent the weekly benefits payable to any employee deemed suitable for vocational rehabilitation services by said office when such employee

The self-insurer filed a complaint to terminate or modify the employee's weekly § 35 benefits, which resulted in a conference order discontinuing weekly benefits in December 1996. Following an appeal by the employee, the parties reached an agreement whereby the self-insurer paid the employee § 35 benefits at a reduced rate. The new § 35 rate included the 15% reduction authorized by OEVR. Several years later, the employee reopened his vocational rehabilitation case, and, on March 3, 2000, OEVR issued a letter removing the 15% reduction in weekly benefits, retroactive to September 29, 1999.[2] (Dec. 2-3.)

On May 3, 2000, the employee filed a claim for penalties under §§ 8(1) and 8(5), alleging that the self-insurer failed to comply with the March 3, 2000 correspondence from the Director of OEVR.[3] (Dec. 1, 4; Employee claim dated May 3, 2000.) The administrative judge denied the employee's claim at conference, and the employee appealed to a de novo hearing. (Dec. 1.) There was no testimony at hearing. The self-insurer submitted the "Commonwealth's Stipulation of Facts" along with a group of documents which were marked together as "Insurer Exhibit" 1. The employee offered

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> refuses such services, during the period of such refusal. . . . Any employee aggrieved by a reduction in weekly benefits . . . under this section may file a claim for reinstatement of such benefits . . .; provided, however, that compensation shall not be reinstated . . . unless the claimant demonstrates that no vocational rehabilitation program of any kind would be appropriate for such claimant.

[2] The fifteen percent reduction in weekly benefits was removed, retroactive to November 15, 1994 by the Director of OEVR on September 11, 2000, after the employee filed the claim which is the subject of this case. (Dec. 3.) The instant claim does not appear to challenge the timeliness or amount of the insurer's payment with respect to benefits paid between November 15, 1994 and September 29, 1999. (Employee's Claim, dated 5/3/00, and Employee brief, 4-9.)

[3] The decision indicates that the employee's claim was also for § 50 interest, (Dec. 1), but the claim form itself does not list § 50. Rather, it lists as an issue § 34B, which provides cost of living increases for employees receiving § 34A permanent and total incapacity benefits or for claimants receiving death benefits pursuant to § 31. The employee's conference memorandum lists § 50 interest as an issue, and appropriately substitutes § 35F, which provides cost of living increases for employees receiving § 35 benefits. Section 35F was repealed by St. 1991, c. 398, § 67, and applied only to employees, such as Mr. Montleon, with dates of injury between November 1, 1986 and December 23, 1991.

number of tables of calculations and documents marked and admitted as Employee Exhibit 1. (Dec. 1.)

The judge, in his decision, stated that the sole issues were whether the Commonwealth owed a penalty pursuant to Sections 8(1) or 8(5). (Dec. 3.) The judge found a penalty was not due under either section. (Dec. 5, 6.) Regarding the employee's § 8(1) penalty claim, he reasoned that the OEVR letter was not one of the documents listed in § 8(1) which triggered a penalty. Regarding the § 8(5) claim, the judge stated, "the employee continues to be paid all benefits to which he is entitled and the Self-Insurer did not at any time willfully withhold any due payments that would constitute a violation of Section 8(5)." (Dec. 5-6.)

The employee makes three arguments on appeal. First, he contends that the judge failed to make any findings regarding his § 35F claim for COLA benefits. Second, he claims that a penalty under § 8(1) was due because the self-insurer did not comply in a timely manner with the requirements of the March 3, 2000 letter from OEVR removing the 15% reduction back to September 29, 1999. The employee maintains that it was the legislature's intent to include a written determination from OEVR reinstating full benefits among the documents listed in § 8(1), which trigger a penalty. Finally, the employee argues that, regardless of whether § 8(1) applies, the self-insurer is subject to a § 8(5) penalty because it paid the employee at an incorrect rate following the OEVR determination. He seems to allege that the self-insurer miscalculated his COLA benefits, leading in whole or in part to the payment of an incorrect weekly rate following the reinstatement of the 15%. It is not clear whether he alleges that the self-insurer paid any other benefits at an incorrect rate.

We disagree with the employee that a § 8(1) penalty is due and affirm the judge's decision on that issue.

Section 8(1) provides, in relevant part:

> Any 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 (2) of subsection (2) of this section 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.

(Emphasis added.)

Legislative intent in enacting a statute is to be gathered, in part, "from a consideration of the words in which it is couched, giving to them their ordinary meaning unless there is something in the statute indicating that they should have a different significance . . . ." Meunier's Case, 319 Mass. 421, 423 (1946). In addition, "[a] statute must be read as a whole so that the various portions taken together constitute a harmonious and consistent legislative enactment." Rodriguez v. Ames Dep't Stores, 13 Mass. Workers' Comp. Rep. 286, 288 (1999), citing Price v. Railway Exp. Agency, 322 Mass. 476, 480 (1948) and Hurley's Case, 302 Mass. 46, 48 (1938).

Here, § 8(1) explicitly designates the documents which, if not complied with, trigger a penalty. A letter from OEVR confirming to the insurer that the reduction in benefits is no longer in effect is not among them. The employee seems to argue that such a letter is an "order" or "decision" within the meaning of § 8(1). However, those terms have specific meanings within Chapter 152. An "order" refers to an administrative judge's written determination awarding, denying or modifying weekly compensation or other benefits following a conference under § 10A. A "decision" refers to an administrative judge's written decision following a hearing pursuant to § 11, or a decision of the reviewing board pursuant to § 11C. See also § 12. None of the statutory or regulatory provisions relating to OEVR's authorization of a reduction or resumption of benefits refers to an "order" or "decision" by OEVR. Section 30G,[4] provides that OEVR may authorize a 15% reduction in a non-cooperating employee's benefits, and that an employee may file a claim for reinstatement of those benefits. The corresponding

[4] See note 1, infra.

regulation, 452 Code Mass. Regs § 4.09(3),[5] authorizes OEVR to "confirm in writing" to insurers that the reduction is no longer effective once the employee fulfills certain conditions. Section 8(2)(f)[6] allows the insurer to reduce benefits once it receives a "communication" from OEVR authorizing such a reduction. Reading § 30G in harmony with other sections of c. 152, as we must, see Taylor's Case, 44 Mass. App. Ct. 495, 501 (1998), we cannot agree with the employee that a written determination by OEVR that the employee is once more entitled to full benefits is one of the documents which, if not complied with, triggers a § 8(1) penalty.

Prior decisions support our interpretation. In Eastern Casualty Ins. Co., Inc. v. Roberts, 52 Mass. App. Ct. 619, 630 (2001), the Appeals Court rejected the employee's claim that a § 8(1) penalty could itself constitute a "payment due" and engender another § 8(1) penalty. The court reasoned that:

> . . . § 8(1) does not apply *to all payments due*. Rather, it applies to "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…." G. L. c. 152, § 8(1). . . The insurer is required to pay within fourteen days of its "receipt of such document." Id. The penalty in question does not derive from a document incorporating any of the actions or agreements enumerated. It arises by operation of the statute and thus is not one of the "payments due" referred to in § 8(1).

Id. at 630, (emphasis in original). Similarly, in Franco-Duraes v. Greater Lynn Mental Health, 13 Mass. Workers' Comp. Rep. 187, 190 (1999), we held that a § 8(1)

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[5] 452 Code Mass. Regs § 4.09(3) reads:

> Whenever an injured employee attends a mandatory meeting, actively resumes services, or otherwise justifies to the satisfaction of OEVR the appropriateness of his or her refusal of services, OEVR will confirm in writing to the insurer that no authorization for suspension or reduction of benefits remains in effect.

[6] General Laws c. 152, § 8(2), reads, in relevant part:

> An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:
>
> > (f) the insurer has received a communication from the office of education and vocational rehabilitation authorizing suspension or reduction of payment under section thirty G; . . .

penalty was not triggered where voluntary § 7(1) payments without prejudice are terminated because a § 8(1) penalty applies to failure to make all required payments only where the insurer has received one of the documents listed in § 8(1).[7] Accordingly, we affirm the judge's denial of a penalty under § 8(1). However, we agree with the employee that the judge erred by failing to address his claim for § 35F, COLA benefits. We recommit the case for further findings on the amount of COLA payments due the employee after September 29, 1999. Once he makes those findings, the judge should reconsider whether a § 8(5) penalty is due.

The employee's contention that the judge failed to address his COLA claim and his claim for a § 8(5) penalty appear to be related. In other words, the employee seems to allege that the self-insurer miscalculated his COLA benefits, leading in whole or in part to the payment of an incorrect weekly rate following the reinstatement of the 15% reduction, which, in turn, lead to an incorrect weekly payment, which he alleges triggered a § 8(5) penalty. We first address the employee's claim regarding § 35F.

The employee alleges that the self-insurer did not pay him the correct weekly benefits after September 29, 1999, as required by the OEVR letter of March 3, 2000, because it miscalculated his COLA benefits. He argues that the judge failed to make any findings regarding his § 35F claim, though he raised COLA (albeit alleging the incorrect section of the statute, i.e. § 34B) in his initial claim, and then in his conference memorandum, where he raised the correct statutory provision, § 35F. The self-insurer, while not acknowledging the COLA claim, contends that all benefits due were paid. It points out that the employee based many of his calculations on an order of compensation filed on October 6, 1993, which was later amended on October 26, 1993 to reduce his average weekly wage from $177.26 to $157.26.

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[7] In Franco-Duraes, supra, we left open the possibility that § 8(5) penalties might apply to such a situation. Then in Bernier v. Lebaron Foundry, Inc., 16 Mass. Workers' Comp. Rep. ___ (August 13, 2002), we held that a § 8(1) violation of the seven day notice rule has nothing to do with the § 8(1) penalty but rather that the Legislature intended a § 8(5) penalty for an insurer's failure to properly terminate payments without prejudice under §§ 7(1) and 8(1).

We hold that the employee's COLA claim was properly raised, and the judge erred by not making findings on that issue. Despite the fact that the employee incorrectly cited § 34B in his claim form, rather than § 35F, he corrected his mistake in his conference memorandum. (See Employee brief, 2, n. 1; Employee's claim form dated 5/3/00; temporary conference memorandum cover sheet dated 10/31/00.) Though the parties did not fill out an issues sheet at hearing, and we do not have the benefit of a transcript or stipulation of issues, there is no indication that the employee withdrew his COLA claim. Section 11B requires a judge to address all issues in controversy. Failure to do so requires recommittal. See Thompson v. Sturdy Memorial Hosp., 13 Mass. Workers' Comp. Rep. 427, 429 (1999).

Furthermore, the judge's findings must be sufficiently specific so that we can tell "with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). The judge's finding here that "the employee continues to be paid all benefits to which he is entitled and the Self-Insurer did not at any time willfully withhold any due payments that would constitute a violation of Section 8(5)," (Dec. 5-6), is so cursory and unspecific that we do not know whether the judge considered the § 35F claim at all. On recommittal, he should do so.

The § 8(5) penalty claim appears to be based, at least in part, on the employee's allegation that the self-insurer did not pay the correct COLA benefits after the 15% reduction was removed. The employee argues that, even if an OEVR letter removing the 15% reduction does not fall under the provision of § 8(1), it does fall under the broader provisions of § 8(5), which reads:

> Except as specifically provided above, if the insurer terminates, *reduces,* or *fails to make any payments required under this chapter, and additional compensation is later ordered,* the employee shall be paid by the insurer a penalty payment equal to twenty per cent of the additional compensation due on the date of such finding.

Thus, there are two requirements for a § 8(5) penalty to accrue: 1) the self-insurer must terminate, reduce or fail to make any payments required under c. 152; and 2) additional compensation must later be ordered. We address these requirements separately.

Where § 8(1) allows a penalty for untimely commencement of benefits, § 8(5) provides a penalty for payments which are improperly discontinued or reduced. Figueiredo's Case, 49 Mass. App. Ct. 906, 907-908 (2000); see also Bernier v. Lebaron Foundry, Inc., 16 Mass. Workers' Comp. Rep.___ (August 13, 2002). In Figueiredo's Case, supra, the court upheld a § 8(5) penalty where a judge had found that the insurer unilaterally discontinued benefits for a period of time and improperly continued to pay benefits at a reduced recoupment rate after recovering its overpayment. In the instant case, § 8(2)(f) allows an insurer to unilaterally reduce an employee's benefits if it has received a communication from OEVR authorizing it to do so. Once OEVR revokes such authorization, the insurer has illegally reduced the employee's benefits if it does not reinstate the employee's benefits. Thus, if, in the instant case, the self-insurer failed to properly reinstate the 15% due the employee pursuant to the OEVR letter, then it would have "illegally reduced" Mr. Montleon's benefits.[8]

For the employee to be entitled to a § 8(5) penalty, additional compensation[9] must later be ordered. Here, the judge did not order additional compensation, and we would need go no further in our analysis had his denial of additional compensation been adequately supported. However, as discussed above, the judge's finding that "the employee continues to be paid all benefits to which he is entitled and the Self-Insurer did

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[8] Another way to look at the self-insurer's failure to reinstate the 15% is that the insurer has "fail[ed] to make any payments required under this chapter. . . ." G. L. c. 152, § 8(5). This language is broader than that of § 8(1) which refers to "all payments due the 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 . . . ." When the insurer is no longer authorized by OEVR to reduce or discontinue weekly compensation benefits, any benefits not paid become "payments required under this chapter.' G. L. c. 152, § 8(5).

[9] 452 Code Mass. Regs § 1.02 provides that "Additional Compensation as used in M.G.L. c. 152, § 8(5), shall mean compensation due pursuant to an order or decision finding that prior compensation was illegally discontinued."

not at any time willfully withhold any due payments that would constitute a violation of Section 8(5)," (Dec. 5-6), is insufficient for us to determine what facts the judge found and whether he correctly applied the law. Basically, we cannot tell the amount of the weekly benefits (§ 35 and COLA) paid by the self-insurer, or the amount actually due, if different. We note that, though the judge states that the case came before him on "the Stipulation of Facts, Self-Insurer Exhibit #1, Employee Exhibit #1, and the waiving of lay testimony," there does not appear to be any agreement between the parties as to the amount due the employee. The Stipulation of Facts was the Commonwealth's, and was not signed by the employee. Moreover, though the employee submitted numerous tables with calculations and supporting exhibits, his brief does not make it clear exactly what he alleges has not been paid. Since his only claim, other than the penalty claims, was for § 35F COLA benefits, COLA is the only "additional compensation" that could have been ordered. However, the judge did not make any finding at all regarding the COLA claim, even though it was raised on the initial claim form and at conference. On recommittal, the judge should address the employee's claim for COLA benefits, and determine whether additional benefits are due.

The issue then becomes whether an order to pay additional COLA benefits would trigger a penalty under § 8(5). We hold that it would. The statute refers to failure to make "*any payments* required under this chapter" (emphasis added) and then to "additional compensation" later being ordered. We have held § 35F COLA benefits to be compensation for purposes of § 11D(3), which allows an insurer to recover overpayments by unilateral reduction of weekly benefits up to 30% of any remaining compensation owed the employee. Kerrigan v. Commercial Masonry Corp., 15 Mass. Workers' Comp. Rep. 209, 215 (2001). In addition, the Appeals Court has treated § 34B COLA as compensation subject to § 15 reimbursement analysis. Barbosa's Case, 47 Mass. App. Ct. 236 (1999). But see Armstrong's Case, 416 Mass. 796 (1994) (court held that § 34B COLA benefits were not compensation as the term was used in § 28).

Therefore, we recommit this case to the administrative judge to make specific findings consistent with this decision. Should the judge find that the self-insurer has

failed to pay the COLA benefit correctly, the employee will be entitled to a twenty percent penalty. See Bernier, supra at ____.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **September 11, 2002**

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge