

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO.: 038554-97**

Tod Peterson  
Edward J. Vella, Jr.  
Granite State Insurance Co.

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**

(Judges Levine, McCarthy and Maze-Rothstein)

**APPEARANCES**

J. Peri Campoli, Esq., for the employee  
John Canniff, Esq., for the insurer

**LEVINE, J.** The employee and insurer cross-appeal from a decision in which an administrative judge awarded a closed period of G.L. c. 152, § 34, total incapacity benefits, and ongoing § 35 partial incapacity benefits, for an accepted industrial injury. The insurer contends that the judge erred in calculating the average weekly wage based on year-round – rather than seasonal – employment. We summarily affirm the decision as to that conclusion. The employee argues that the judge erred by denying his claim for a § 8(5) penalty based on the insurer’s illegal reduction of incapacity benefits, and by assigning an earning capacity unsupported by the evidence. We summarily affirm the judge’s assignment of an earning capacity. We reverse the denial of a § 8(5) penalty, and order that it be paid.

We set out only the facts relevant to the penalty issue. The employee injured his lower back at work on September 22, 1997.<sup>1</sup> (Dec. 5.) The insurer commenced without-prejudice payments pursuant to the provisions of G.L. c. 152, §§ 7(1) and 8(1), as of the date of injury. (Insurer’s Notification of Payment; Temporary Conference Memorandum

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<sup>1</sup> The decision, on page 3, erroneously identifies the date of injury as April 22, 1997.

Cover Sheet.)<sup>2</sup> The insurer paid the employee § 34 weekly total incapacity benefits based on an average weekly wage of \$454.56 until June 29, 1998. (Temporary Conference Memorandum Cover Sheet.) On that date, which was more than three months beyond the 180 day payment without prejudice period prescribed by G.L. c. 152, § 8(1), the insurer unilaterally reduced its weekly payment from \$272.84 to \$126.21, based on a reduced average weekly wage of \$166.10, which reflected seasonal, rather than year-round employment. (Id.; Dec. 3, 6-7.) The employee alleged illegal discontinuance, claiming that the insurer's action was taken in violation of the provisions of §§ 8(1) and (2); he therefore brought a claim for a penalty under § 8(5). At conference, the judge ordered payment of § 34 benefits, based on the higher average weekly wage, until December 15, 1998 and, thereafter, payment of ongoing § 34 benefits based on the lower average weekly wage. Both parties appealed to a full evidentiary hearing, after which the judge denied the employee's claim for the § 8(5) penalty. (Dec. 2, 7.)

The relevant provisions of G.L. c. 152, § 8, are as follows:

- (1) An insurer which makes timely payments pursuant to subsection one of section seven, may make such payments for a period of one hundred eighty calendar days from the commencement of disability without affecting its right to contest any issue arising under this chapter. An insurer may terminate or modify payments at any time within such one hundred eighty day period without penalty . . . if it gives the employee and the division of administration at least seven days written notice of its intent to stop or modify payments and contest any claim filed.  
...
- (2) An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:  
...
  - (a) compensation has been modified or discontinued pursuant to an order or decision of an arbitrator, an administrative judge, the reviewing board or court of the commonwealth;  
...
  - (e) payments are terminated or modified pursuant to subsection (1);  
...

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<sup>2</sup> We take judicial notice of these departmental forms included in the board file. P.J. Liacos, Massachusetts Evidence § 2.8.1, at 43 (6<sup>th</sup> ed. 1994).

(5) 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.

The undisputed fact is that, when the insurer unilaterally reduced the § 34 benefits it was paying the employee on June 29, 1998, it was beyond the 180 day payment without-prejudice period set out in § 8(1);<sup>3</sup> therefore, it had no right to unilaterally modify its payment of weekly benefits to the employee. At that time, if the insurer sought to reduce the payment it was making to the employee, it had to file a complaint seeking modification under § 10(1). See also § 8(2)(a) supra.<sup>4</sup> Since the insurer did not follow the required procedure, we order it to pay the employee a penalty equal to twenty percent of the additional compensation ordered by the judge following the § 10A conference (from June 29, 1998 until December 15, 1998).

Except as ordered above, the decision is affirmed. Pursuant to § 13A (6), the employee's counsel is awarded an attorney's fee of \$1,243.36.

So ordered.

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<sup>3</sup> “If an insurer continues to make payments beyond 180 days, this will constitute a binding acceptance of liability in the absence of an extension of the payment without prejudice period.” L. Locke, Workmen’s Compensation, § 4.10 (Koziol Supp. 2000).

<sup>4</sup> No other subsection of § 8(2) applies in this case. There is no merit to the contention the insurer made at hearing that subsection (2)(h) applied: “payments are suspended or reduced pursuant to section eleven D for failure to respond to an insurer’s written request to provide an earnings report, or for past overpayments.” See Insurer’s Proposed Findings of Fact and Rulings of Law.

**Tod Peterson**  
**Board No.: 038554-97**

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Frederick E. Levine  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

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Susan Maze-Rothstein  
Administrative Law Judge

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