COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 088567-88**

William W. Kemp	Employee
Victory Market	Employer
Commercial Union/One Beacon Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, McCarthy and Wilson)

APPEARANCES
William F. Scannell, Esq., for the employee
Dougles F. Boyd, Esq., for the insurer

LEVINE, J. The insurer appeals from a decision awarding the employee penalties under §§ 8(1) and 8(5) for the insurer's failure to timely reimburse the employee for out-of-pocket medical expenses, after a conference order issued for payment of medical bills. Under the circumstances of this case, the judge's award of penalties was not erroneous. We therefore affirm the decision.

The employee contracted arthritis due to exposure to the cold while working as a meat cutter. (Dec. 4.) The insurer paid benefits, and the claim was settled on February 2, 1996 by lump sum agreement with liability accepted. (Dec. 3.) The employee filed a claim for medical benefits in 1996. At the § 10A conference, the employee submitted bills for treatment; on December 31, 1996, an administrative judge ordered the insurer to pay §§13 and 30 benefits, including that "[t]he insurer is to pay for medical treatment and medicines up to March 4, 1994." The employee appealed that order. On April 28, 2000, another administrative judge issued a hearing decision ordering the insurer to pay medical benefits for the employee's arthritis. The insurer did not pay any of the employee's medical bills. (Dec. 4-5.)

The employee next claimed penalties under §§ 7, 8(1), 8(5) and 14 for the insurer's failure to pay medical benefits pursuant to the 1996 conference order. The

employee's § 8(1) claim was based on the insurer's specific failure to pay $920.72 in out-of-pocket expenses for medical care through July 31, 1996. (Dec. 2, 5.) The employee had been submitting bills for treatment to his health insurer, and paying the balance of the bills himself. The bills containing this information had been submitted to the administrative judge and insurer counsel at the 1996 conference. The administrative judge in the present proceedings issued a conference order that the insurer pay the $920.72 out-of-pocket expenses to the employee, but denied the penalty claims. The insurer paid the $920.72, and the employee appealed the denial of the penalty claims. (Dec. 5-6.)

In his hearing decision issued on December 18, 2001, the judge awarded the employee the penalties claimed under §§ 8(1) and 8(5).[1] The judge noted the language of § 8(1), which provides for a penalty of up to $10,000 for the failure "to make all payments due an employee under the terms of an order [or] decision . . . ." The judge found: "[T]he employee submitted the bills at the outset and insurer counsel had them throughout the proceedings. Insurer chose not to make any payments under the order or decision and the time period was well in excess of the ninety day limit" for the imposition of a $10,000 penalty. (Dec. 6-7.) Moreover, the judge ordered that $184.14 (20% of $920.72) was due the employee under § 8(5) for the insurer's failure "to make any payments required by this chapter, [where] additional compensation [was] later ordered .

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[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 [or] decision . . . 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.

General Laws c. 152, § 8(5), provides, in pertinent part:

> [I]f 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 judge denied the employee's claims for penalties under §§ 7 and 14. (Dec. 7-8.)

The insurer argues on appeal[2] that the employee is barred from penalties on its failure to timely pay the out-of-pocket medical expenses in question, because the employee did not comply with G.L. c. 152, § 7G, and its cognate regulation, 452 Code Mass. Regs. § 1.07(2)(c).[3] Those provisions together establish prerequisites regarding the employee's presentation of documentation supporting a claim for medical benefits. Such prerequisites are not germane to the issue of penalties for late payment of medical benefits ordered by an administrative judge. The time for the insurer's § 7G argument was at the § 10A conference in 1996 or at the hearing that followed. Assuming the insurer did make such an argument, clearly the administrative judge did not accept it, as the insurer was ordered to pay §§ 13 and 30 medical benefits. The insurer did not appeal that 1996 conference order, and we do not entertain the argument at this late date in the proceeding. Put another way, the underlying entitlement to the payment of the medical

[2] Although the employee appealed the hearing decision, his brief presents no arguments as to how the decision was erroneous under § 11C. We therefore ignore the appeal.

[3] General Laws c. 152, § 7G, provides:

> The senior judge in consultation with the commissioner shall promulgate rules setting forth the required documentation to be attached to any claim for benefits or complaint for modification or discontinuance of benefits. The attachment of all required documentation shall be a prerequisite for the acceptance of said claim or complaint for processing by the office of claims administration.

452 Code Mass. Regs. § 1.07(2)(c) provides, in pertinent part:

> Claims for payment for adequate and reasonable health care services shall, where applicable, be accompanied by the following:
>
> a. the dates of service;
> b. the type of treatment or service and the itemized costs;
> c. office notes, hospital records, or a statement from the attending physician or medical vendor that such visit, testing, prescription drug, therapy, or ancillary medical service device or aid was reasonable, necessary, and causally related to the injury for which the employee is eligible for benefits.

benefits ordered in 1996 -- the only matter that the insurer's § 7G argument contemplates, see Hall v. Boston Park Plaza Hotel, 12 Mass. Workers' Comp. Rep. 188, 190 (1998) -- is beyond dispute at this point in the proceedings.

The judge's order of the § 8(1) penalty was correct. Generally, § 8(1) penalties do not apply to medical benefits, as those payments are made to providers, and are not "payments due an employee. " See Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528, 533 (1995)(analyzing the legislative history of the § 8(1) penalty scheme). However, we recognize an exception for reimbursements of out-of-pocket payments made by employees to providers. See id. at 533 n.4 ("payments due an employee" necessarily includes " instances when the employee has personally paid for reasonable and necessary treatment expenses out of his own pocket"); DeFilippo v. University of Mass./Amherst, 11 Mass. Workers' Comp. Rep. 383, 387-388(1997)(§ 8(1) penalty due for non-payment of conference order to pay for past chiropractic services, largely self-paid by employee, which bills were presented at conference). The employee's claim at the 1996 conference was strictly for payment of medical bills (which totaled $920.72) that were presented at that proceeding, and a copy of which was given to insurer's counsel. Those bills had largely been paid by the employee's health insurer, with the employee paying the balances himself. (Dec. 5-6.)[4] The insurer did not appeal the judge's specific 1996 order "to pay medical treatment and medicines up to March 4, 1994." Because the judge in the present proceeding had the bills and the amount owed to the employee as a sum certain before him, by way of judicial notice of the 1996 conference materials contained in the board file, (Dec. 2, 5), and not disputed by the insurer, the § 8(1) penalty was properly ordered for the insurer's non-payment of that amount due the employee.

The judge's order of a § 8(5) penalty was likewise correct. The insurer "fail[ed] to make [a] payment[] required under this chapter, and additional compensation [was] later ordered." The payment that the insurer failed to make was, of course, payment of

[4] The insurer does not dispute these findings.

reimbursement contained in the original 1996 conference order for payment of medical benefits. The additional compensation ordered was, in this case, the 2000 conference order (once more) that the medical benefits be paid. We have read "*additional* compensation . . . ordered" and "*additional* compensation due" (emphasis added) to include the payments that an insurer has failed to make. See Bernier v. Lebaron Foundry, Inc., 16 Mass. Workers' Comp. Rep. ___ (August 13, 2002); DeFilippo, supra at 389.

Accordingly, the decision is affirmed. Pursuant to § 13A(6), the insurer is ordered to pay an attorney's fee of $1,273.54

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Filed: **January 16, 2003**