COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDSUTRIAL ACCIDENTS **BOARD NO. 100941-87**

Willie Mae Cruthird	Employee
City of Boston Health & Hospital Dept.	Employer
City of Boston	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Levine and Wilson)

APPEARANCES
Christopher S. O'Connor, Esq., for the employee
Danna Crowley, Esq., for the self-insurer at hearing
John T. Walsh, Esq., for the self-insurer on appeal

COSTIGAN, J. The employee on appeal asserts that the administrative judge's denial of her claim for a § 8(1) penalty, for the self-insurer's failure to pay G. L. c. 152, § 34B,[1] cost-of-living adjustments (COLA) on her permanent and total incapacity benefits, was contrary to law. We disagree, and affirm the decision.

The employee's penalty claim was tried on agreed stipulations of fact which, in pertinent part, included that the employee sustained a work-related low back injury on March 28, 1987; that on March 12, 1992, following a § 10A conference, an administrative judge issued an order of payment of § 34A benefits from and after March

[1] General Laws c. 152, § 34B, as amended by St. 1991, c. 398, § 63, provides in pertinent part:

> October first of each year shall be the review date for the purposes of this section.
>
> Any person receiving or entitled to receive benefits under the provisions of section thirty-one or section thirty-four A whose benefits are based on a date of personal injury at least twenty-four months prior to the review date shall have his weekly benefit adjusted, without application, in accordance with the following provisions; provided, however, that no increase in benefits shall be payable which would reduce any benefits the recipient is receiving pursuant to federal social security law. . . .

24, 1992;[2] that the self-insurer has paid § 34A benefits continuously since that time; and that on February 21, 2001, the self-insurer paid the employee COLA benefits by way of a check for $735.50, which represented nineteen weeks and six days of retroactive COLA benefits due her from October 1, 2000 to February 16, 2001. (Dec. 1-2.)

On April 10, 2001, the employee filed a claim for a § 8(1) penalty of $10,000, alleging late payment of COLA benefits. The claim was denied by a different administrative judge at a § 10A conference, and the employee's appeal resulted in a hearing de novo before the judge whose decision we review. (Dec. 2.)

The judge identified the parameters of the employee's claim:

> The employee contends that the Self-insurer has failed to comply with the terms of Judge Ryan's Order filed on March 12, 1992 . . . which ordered payment of Section 34A benefits from March 24, 1992 to date and continuing. She contends that, since the Employee was receiving § 34A weekly benefits pursuant to Judge Ryan's 1992 Order as of October 1, 2000, the Self-insurer failed to comply with the terms of Judge Ryan's Order when it did not pay prior to February 21, 2001 (Stipulation 6) the cost of living adjustment . . . that was due, without application, as a matter of law, on the review date of October 1, 2000. Graziano's Case, 9 Mass. Workers' Comp. Rep. 729 (1995); G.L. c. 152, § 34B. . . .
>
> Based on the above, the Employee claims that she is due a penalty pursuant to G. L. c. 152, § 8(1) which provides in relevant part as follows:
>
> > 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, . . . *within fourteen days of the insurer's receipt of such document*, shall result in a penalty . . . .

(Dec. 3-4; emphasis added.)

Noting correctly that penalty statutes must be narrowly applied, Collatos v. Boston Retirement Bd., 396 Mass. 684 (1986), the judge found that the terms of the 1992 conference order did not include a specific order of COLA benefits. Thus, having timely paid the § 34A weekly benefits which were ordered, there was no other term with which the self-insurer failed to comply so as to render it subject to a § 8(1) penalty. We agree.

[2] The day after the employee exhausted the 156-week statutory entitlement to § 34 benefits.

In the alternative, the employee argued to the judge, as she does on appeal, that because COLA benefits are, by statute, to be paid "without application," the self-insurer was automatically obliged to pay such benefits, notwithstanding the absence of any express term in the order addressing her COLA entitlement. The judge concluded that the phrase, "without application," in § 34B, read in context with the rest of the statute, cannot properly be construed to mean that COLA benefits are automatically due whenever § 34A benefits are awarded: "The plain language of § 34B states that 'no increase in benefits shall be payable which would reduce any benefits the recipient is receiving pursuant to federal social security law.' " (Dec. 4.) Again, we agree. Without information as to the employee's social security status, whether she is entitled to receive COLA benefits is an unresolved issue. Such information falls far outside the "terms" of the conference order -- the "document" which started the § 8(1) clock running when the self-insurer received it. A § 8(1) "document" must be unequivocal in its terms in order to fairly impose the threat of a penalty for non-payment. See Pacellini v. Cape Cod Fireplace Shop, 17 Mass. Workers' Comp. Rep. ___ (September 3, 2003)(hearing decision in which employee prevailed did not oblige insurer to reimburse employee her share of § 11A appeal fee when reimbursement not ordered in decision).

As did the administrative judge, we reject the employee's third theory of penalty entitlement: that the [department's] Commissioner's annual Circular Letter, establishing the COLA adjustment for the ensuing year, constituted the § 8(1) document triggering the § 8(1) schedule of penalties. The judge found:

> The Commissioner issues this Circular Letter annually in October, with the changes to be effective as of October 1. The Employee therefore points to October 1, 2000 as the triggering date for the running of the § 8(1) "clock." I find this suggestion not to be persuasive. A Commissioner's Circular Letter is not within the ambit of the types of documents that are listed in § 8(1). See Franco-Duraes v. Greater Lynn Mental Health, [13 Mass. Workers' Comp. Rep. 187, 190 (1999)](Where an insurer terminated payments without prejudice sooner than seven days after filing a Notification of Termination there was no order, decision, arbitrator's decision, approved lump sum or agreement upon which to base an award of a § 8(1) penalty). Furthermore, I note that the annual October Circular Letter rarely, if ever, is actually issued on October 1, because the statistics for the

> prior year must be collected and evaluated in order to come up with the new figures that are announced and established in the Circular Letter. G. L. § 34B(a). I am persuaded, therefore, that using October 1, 2000 would be a fiction; I am persuaded that no one, including the Insurer [sic], got any form of notice or document about COLA on October 1, 2000.

(Dec. 5.) We endorse the judge's sound reasoning.[3]

The judge also correctly distinguished our opinion in Favata v. Atlas Oil Co., 12 Mass. Workers' Comp. Rep. 12 (1998), in which we awarded a § 8(1) penalty for the insurer's failure to pay § 50 interest ordered in a § 10A conference order of payment of § 34 benefits. The judge noted that, unlike the 1992 order in the present case, the conference order in Favata contained a specific order for payment of § 50 interest, and that order, unlike the circular letter, was within the list of § 8(1) documents which start the § 8(1) penalty clock ticking. (Dec. 4, n.4.) See, also, Pacellini, supra.

The judge's denial of the employee's § 8(1) penalty claim was correct as a matter of law. Accordingly, we affirm his decision.

So ordered.

---

[3] We agree with the judge that an employee's remedy for an insurer's failure to pay COLA benefits may be found, under appropriate circumstances not present here, within the realm of G. L. c. 152, 14(1), which penalizes an insurer for defending any proceedings without reasonable grounds. See Graziano v. Polaroid Corp., 9 Mass. Workers' Comp. Rep. 729 (1995)(§ 14(1) penalty due for insurer's resistance to payment of four years of § 34B COLA due, even after employee's COLA claim reached conciliation). In this case, however, the employee never brought a claim for § 34B COLA benefits. There is some indication, though no stipulation or evidence, that the self-insurer voluntarily paid COLA benefits for a lengthy period of time before payments stopped on or about October 1, 2000. See Dec. 1, n.1. By the time the employee filed her penalty claim in April, 2001, however, the self-insurer had already paid her retroactive COLA benefits and such payments were continuing. (Dec. 2.) Moreover, § 8(5) provides a 20% penalty when an insurer "fails to make any payments required" under c. 152, if such "additional compensation is later ordered," but § 34B COLA benefits are not necessarily "compensation." See, e.g., Armstrong's Case, 416 Mass. 796 (1994)(COLA supplements not treated as compensation to be doubled under G. L. c. 152, § 28); Graziano, supra at 731(COLA benefits not compensation subject to § 50 interest). But see Barbosa's Case, 47 Mass. App. Ct. 236 (1999)(COLA treated as compensation subject to § 15 reimbursement analysis); Kerrigan v. Commercial Masonry Corp., 15 Mass. Workers' Comp. Rep. 209, 215 (2001)(§ 35F COLA treated as compensation for purposes of § 11D(3) recoupment).

_____
Patricia A. Costigan
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

Filed: **September 15, 2003**