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10 Common Mistakes with Simple Solutions Every Adjuster Should Know

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Massachusetts Law is a very complicated and forms driven minefield. To the novice adjuster, there are penalties lurking with every misstep. Some penalties are significant ($10,000) and some are small ($200) but no penalty is trivial. The intent of the following materials is to highlight some common areas of concern that I have noticed in the past 19 years. Since our statute (Chapter 152) has not changed since 1991, these 10 areas have remained fairly consistent and troubling. These materials are not created to provide the "answer" but to allow for discussion and a fuller understanding, please consult legal counsel (me) as necessary early on.

10 Common Mistakes with Simple Solutions Every Adjuster Should Know

1. Pay without Prejudice (PWOP) Period
2. Extension of the PWOP Period
3. Language of the Denial (Form 104), also Form 106
4. Section 50 Interest
5. Average Weekly Wage (AWW)
6. Termination of weekly benefits during the PWOP Period.
7. Reduction of benefits under Section 13A (10)
8. No Right To Non-Payment of Ordered Benefits
9. Penalty Traps and Attorney Fees
10. Waiting Period under Section 29

1. Pay without Prejudice (PWOP) Period

In Massachusetts, the PWOP period runs initially for 180 days. See M.G.L. ch. 152, section 7.

The insurer MUST make Payment (using a form 103) or Deny (using Form 104) within 14 days <u>of receipt of either</u> the Form 101 (FROI) First Report of Injury from the employer or Form 110 (employee claim).

Failure to make payment timely leads to numerous problems that may included:

A) Loss of the PWOP period
B) Payment of a $200 penalty to the employee
C) Late payment in the absence of the $200 penalty and/or Section 19 agreement could be intrepreted as acceptance of the claim and loss of any unilateral rights.
D) Under Section 7 the penalty for failure to file the denial or notice of payment can reach $10,000

§7(2): PENALTIES FOR LATE PAYMENT OR RESPONSE

- $200 to employee if no denial or payment within 14 days.
- $2,000 to DIA if no payment or denial within 60 days.
- $10,000 to DIA if no payment or denial within 90 days.

2. Extension of the PWOP Period

The PWOP period may be increased by using a DIA Form 105 up to 364 days if agreed to by the employee and approved by the DIA. The signature of the employee and / or attorney must occur within the initial 180 days and more often then not the approval by the DIA within the first 180 days as well.

Practice Tip:
Counsel may be able to get the Form 105 approved after the 180th day if signed by the employee and his/her attorney before the 180th day. When in doubt, check with counsel. Original Form 105 is not always necessary (generally one original signature is sufficient) if the insurer has the original by the employee or employee's attorney.

Approval by the DIA involves a determinaiton by a conciliator whether giving the insurer the extended PWOP is in the best interest of the employee not the insurer.

The failure to extend the PWOP period could force your decision on accepting or denying a case prematurely.

3. Language of the Denial (Form 104), also Form 106

It only takes one denial (Form 104) to waive a defense that could haunt an insurer.

When an adjuster makes the decision to deny a case, all reasons for the denial must be stated or the employee could argue any unstated defense has been waived by the insurer.

Grounds for an Insurer's Refusal to Pay Compensation as used in M.G.L. c. 152, §§7 and 8, shall mean any defense available under M.G.L. c. 152, including but not limited to:

(a) lack of jurisdiction;
(b) late notice;
(c) late claim;
(d) no personal injury;
(e) no injury arising out of and in the course of employment;
(f) no disability;
(g) no causal relation between personal injury and disability;

(h) Section 27 (willful misconduct by the employee)

(i) Section 27A (false representation of the physical condition of the employee)

(j) Section 14 (fraud or failure to the employee to disclose a material fact)

Practice Tip:

We suggest that adjusters "x" off any defense box on the Form 104 (and 106 when terminating during the PWOP period) as applicable. **Further, adjusters are encouraged to write into the "other box" (H) the following:**

"The insurer reserves the right to raise additional defenses based on newly discovered or withheld evidence."

"Section 1(7A)" reserved/ or raised if applicable. Section 1(7A) is the pre-existing condition defense.

Sample defense language could be (d) The insurer denies that the employee has produced sufficient evidenc eof a personal injury.

4. Section 50 Interest

Chapter 152 Section 50 is the interest section. It requires the following:

- 10% per annum from the date of receipt of the Employee's Claim (form #110) by the DIA on claims unpaid within 60 days if later ordered at §10A Conference or §11 Hearing.

- Interest due on $200 penalty if applicable under §7(2).

In 2008, the DIA created a Section 50 interest calculator. It is suggested that this calculator be used at all times (depending on the dictates of your insurer / TPA) because 452 CMR 1.02 states that if an underpayment of interest exists and the insurer relied on the DIA calculator no penalty would be due if the error was due to the DIA calculator.

Please note that the DIA Section 50 calculator is periodically updated so always go to the web site each time to get the most current version. (http://www.mass.gov/lwd/docs/dia/forms/sec-50-calculator.xls)

Practice Tip:

It is strongly suggested, when in doubt whether interest is due to simply call counsel and/or to pay it. In many cases the payment will be a small amount and significantly less then the possible penalty that could be due under Section 8 (below).

§8(1): PENALTIES FOR FAILURE TO MAKE ALL PAYMENTS DUE- <u>FROM THE START</u>

- Any failure to make all payments due under the terms of an order, decision or agreement … within fourteen days (14) the insurer's receipt of such document, shall result in a penalty as follows:

- Penalty of $200. payable to the employee (15-44 days late)

- Penalty of $1,000. (45-59 days late)

- Penalty of $2,500. (60-89 days late)

- Penalty of $10,000. (90 days or more late)

Practice Tip:

When doing a Section 19 Agreement for indemnity and/or Section 36 counsel should include some language addressing whether interest is due, waived or agreed upon.

§8(5): PENALTIES FOR FAILURE TO MAKE ALL PAYMENTS--ONCE STARTED

- If the insurer terminates, reduces or fails to make any payments required under this chapter and additional compensation is later ordered, the insurer shall pay the following penalties:

- Penalty payment to the employee equal to twenty per cent (20%) of the additional compensation due on the date of such finding.

Practice Tip:

Recent case law has clarified that if there is an underpayment and if the insurer makes payment before ordered to do so it might escape a 20% penalty under Section 8(5) but the court left open whether this behavior might warrant any other type of penalty (such as Section 14 for frivolous defense).

Practice Tip:

One last word on penalties, there is currently NO obligation for an employee to notify an insurer of an underpayment to prevent a penalty from accruing. In many cases, if you become aware of a possible penalty get counsel involved immediately. Many attorneys that file for penalties need to show the employee that they are doing something for their client and a solution short of a penalty might be all that is necessary (for example, if an amount is due, overnight or expedite the check to the employee).

5. Average Weekly Wage (AWW)

Chapter 152 Section 1 provides the basic instruction for calculations of the AWW. However, the employee's AWW is a very fluid concept subject to wide "interpretations" by our judges and administrative law judges with the expressed intent as stated in Bunnell v. Wequasset Inn, No. 05228194 (Mar. 31, 1998) reprinted below:

"[t]he entire objective in computing average weekly wage is to arrive at as fair an estimate as possible of an employee's probable future earning capacity[,]"

The most common AWW is the 52 weeks of prior earnings or as close to that as you can get.

Chapter 152, Section 1. The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings:

(1) "Average weekly wages", the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district. In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several insured employers and self-insurers shall be considered in determining his average weekly wages. Weeks in which the employee received less than five dollars in wages shall be considered time lost and shall be excluded in determining the average weekly wages; provided, however, that this exclusion shall not apply to employees whose normal working hours in the service of the employer are less than fifteen hours each week.

Practice Tips:
Estimate when necessary but follow up with an actual wage determination as soon as possible. Try to be low rather then too high. Be careful for a bi-weekly payment period. Overestimating can lead to significant efforts at later recoupment that might be denied. (See materials on recoupment).

Similar employee. Obtain more then one in case the employee challenges the one selected as not similar enough.

Seasonal employment. The Bunnell case highlighted the application to a profession or trade that generally only works a part of the year and with usual anticipated layoffs. Examples are, landscapers, construction, plowing contractors, bus drivers.

If there is a late calculation of the AWW it is suggested that counsel be involved in addressing any under/over payment to maximize the insurer's rights.

The receipt of unemployment benefits or Section 35 benefits will affect the calculations.

6. Termination of weekly benefits during the PWOP Period.

As you know, the insurer has the unilateral right to suspend and/or modify and/or terminate the employee's weekly benefits during the PWOP period under Sections 7, 8. After the PWOP period ends, see the rights as listed under Section 8(2).

However, these PWOP rights are subject to limits. It is commonly believed that the insurer can alter the employee's benefits for any reason at all. That might be changing …

Practice Tip:
When modifying, suspending or terminating an employee's weekly benefits the insurer should have a "good faith" basis for doing so. For example, the treating doctor released the employee or provided limitations, an IME report, a job offer, etc. Recently, judges have begun to pay close attention to the modification and/or termination basis. If a judge later determines the adjuster did not act in good faith, a penalty could be ordered with or without the request of the employee.

Notice. Section 8 requires that the insurer provide the employee with **a minimum of seven (7) days notice** when altering the employee's weekly benefits during the PWOP period (using Form 106 unless the reason is a verified return to work).

The DIA does not count the mailing date as one of the seven "notice" days. The failure to provide the full seven (7) days can result in a penalty for illegal discontinuance of the employee's benefits under Section 8(5) (see penalty under Section 8(5) in earlier materials).

Practice Tip:
Upon commencement of benefit payment (Form 103) it is suggested that the adjuster diary the 150th and 170th day for benchmarks. The 150th day to provide time to obtain an IME if modification is warranted. The 170th day because if the Form 106 is not mailed by the 172nd date, it would be too late in the absence of a Form 105 extension.

7. Reduction of benefits under Section 13A (10)

Frequently underutilized, an adjuster may reduce an employee's weekly benefits under the following limits.

Amount Payable to the Employee Within the First Month from the Date of the Voluntary Payment, Order or Decision as used in M.G.L. c. 152, §13A(10), shall mean any compensation due the employee under the terms of the voluntary payment, order or decision pursuant to M.G.L. c. 152, any future weekly benefits pursuant to M.G.L. c. 152 due the employee for the first 30 days subsequent to the date of execution of a voluntary payment or the issuance of an order or decision.

Cash Award as used in M.G.L. c. 152, §13A(10), shall mean any specific compensation benefits payable under M.G.L. c. 152 any weekly benefits payable under M.G.L. c. 152 of an amount that exceeds the weekly amount being paid the employee for the week immediately prior to the date of the voluntary payment, order or decision.

Chapter 152: Section 13A. Attorney's fees for employees

Section 13A. (1) Whenever an insurer contests an initial liability claim for benefits ……

(10) The attorneys' fees specified in this section shall be the only fees payable for any services provided to employees under this chapter unless otherwise provided by an arbitration agreement pursuant to section ten B. In any instance in which an attorney's fee under subsection (1) to (6), inclusive, is due as a result of a cash award being made to the employee either voluntarily, or pursuant to an order or decision, the insurer may reduce the amount payable to the employee within the first month from the date of the voluntary payment order or decision, by the amount owed the claimant's attorney; provided, however, that the amount paid to the employee shall not be reduced to a sum less than seventy-eight percent of what the employee would have received within that month if no attorney's fee were payable. …

Practice Tips:
If an adjuster has decided to enforce the 13A(10) deduction it is strongly suggested a diary entry be set up to end any ongoing reduction so as to NOT over recoup and thus set up a penalty for failure to pay all benefits due under Section 8.

BIG CHANGE – In 2012 the Appeal's Court removed the right to recoup from an award of Section 36. A recent case prevented the recoupment because the amount of the Section 36 and attorney fee were both negotiated and the right to recoup the 13A(10) was not specifically preserved by the parties. (Spaniol's Case, 81 Mass. App. Ct. 437 (2012)). **At this point do not recoup out of Section 36**.

8. No Right to Non-Payment of Ordered Benefits

Massachusetts does NOT allow for an insurer to withhold payment under an order, decision or agreement pending a dispute or appeal. Massachusetts requires that an insurer make all payments due, whether they are aware of them or not (to be later explained).

No Interlocutory Appeal

All payments must be timely made after the issuance and receipt of an order, decision or Agreement or other document requiring payment. Failure to do so could result in penalties under one or both of Section 8(1) and 8(5). In Massachusetts worker's compensation, an appeal does not stay the obligation to make all necessary payments. See, Pacellini v. Cape Cod Fireplace Shop, AJ, P. Costigan (no ability of Administrative Judge to stay penalties pending decision or conference order due to appeal). See also Paul Levesque v. Travelers, J. McCarthy 2/16/07.

Practice Tip.

It is strongly suggested that any question of payment due should be discussed with counsel. For example, if there is a scrivener's error in a conference order, early intervention by counsel may allow for a corrected order or agreement of counsel as to the mistake. Self help by an insurer has led to a $10,000 penalty even where the insurer may have been correct. There is no such thing as a *de minimus* amount due to an employee.

9. Penalty Traps and Attorney Fees

Under Section 8 an insurer must make all payments due to an employee within fourteen (14) days of receipt of an Order, Decision, Agreement or FROI (if not a denial).

Employee counsels have been creative in these lean times in finding ways to artistically create a right to a legal fee. Some examples are:

A) Mailing a Form 110 to the insurer one week or so before the DIA. An attorney fee is due if the claim is not adjusted within the first twenty-one (21) days of the claim filing. Usually, if the claim is filed with the DIA at the same time as the insurer the conciliation will occur within the first 21 days. By mailing it to the insurer early, by the time the conciliation occurs it can be argued a fee is due as it is generally past the initial 21 days.

Practice Tip:
Have the conciliator extend the time where the claim or burden of proof is missing information.

B) Filing claims for reimbursement of out of pocket expenses to an employee. If an insurer has been ordered to reimburse an employee for specified expenses or out of pocket expenses an employee can argue that the failure to reimburse is triggered under Section 8. Thus, counsel could argue failure to reimburse an employee for a prescription ordered at conference could result in a $10,000 penalty if the payment is more then 90 days after ordered.

Practice Tip:
Consult counsel immediate if there is a question.

C) Withdrawal for a Conference or Hearing. Insurer may decide to adjust and/or withdraw from litigation as not cost effective. However, the right to an attorney fee may be triggered depending on how this is accomplished. For example, failure of the adjuster/counsel to withdraw more then five business days (excluding holidays and Sundays) would trigger the right to a hearing fee ($5,311.62), or some part thereof.

Practice Tip:
Withdraw when it is determined that the insurer does not want to pursue further litigation.
Offers to Pay- One way to limit the right to an attorney fee is to make an offer to pay a disputed claim more then two (2) days prior to a conference or more then five (5) days prior to a hearing. It is suggested that in many cases a nominal attorney fee be made part of the offer to pay to avoid litigation over whether any fee is due. 452 C.M.R. 1.19(3).

10. Waiting Period under Section 29

The right to weekly benefits is not triggered until a minimum waiting period has elapsed.

Section 29. No compensation pursuant to section thirty-four or thirty-five shall be paid for any injury which does not **incapacitate the employee from earning full wages for a period of five or more calendar days**. If incapacity extends for a period of twenty-one days or more, compensation shall be paid from the date of onset of incapacity. If incapacity extends for a period of at least five but less than twenty-one days, compensation shall be paid from the sixth day of incapacity. Except as otherwise provided in this chapter, no compensation shall be paid for any period for which any wages were earned. No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

Practice Tip:
Verify whether the FROI (Form 101) has been filed timely or prematurely before issuing payment or the denial.

Of interest:
There may be a discrepancy between the instructions on the FROI (Form 104) and Section 29.

Copied from a current Form 101 title page:

"THIS FORM MUST BE FILED BY THE *EMPLOYER* IN THE EVENT OF AN INJURY THAT RESULTS IN DEATH OR FIVE OR MORE CALENDAR DAYS <u>OF TOTAL OR PARTIAL INCAPACITY</u> FROM EARNING WAGES."

When in doubt stick with the language of the statute. However, should it be necessary consider arguing the alternative. It is likely that the "partial" will be applicable for an employee who returns to work in a modified position with wage loss so the insurer is likely aware of the injury by that time.