Hopkins, Josannah

PENALTIES (RCW 51.48.017)

Unreasonable delay

Where the Department determines that a penalty is due for unreasonable delay in payment of benefits, the amount "then due" as set out in RCW 51.48.017 is the aggregate amount due. **….*In re Josannah Hopkins*, Order Denying Motion for Reconsideration, BIIA Dec., 13 21202 (2015)** [*Editor's Note:* The Board's decision was appealed to superior court under Clark County Court Cause No. 15-2-00599-0.]

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IN RE: JOSANNAH HOPKINS	**)**	**DOCKET NO. 13 21202**
	)	
	)	**ORDER DENYING MOTION FOR**
CLAIM NO. SD-85849	**)**	**RECONSIDERATION**

The claimant, Josannah Hopkins, filed an appeal with the Board of Industrial Insurance Appeals on September 4, 2013, from an order of the Department of Labor and Industries dated August 30, 2013. In this order, the Department ordered the self-insured employer to pay a penalty of $962.91 to the claimant for unreasonable delay in payment of time-loss compensation benefits. On June 27, 2014, an industrial appeals judge issued a Proposed Decision and Order in which she reversed and remanded the Department order dated August 30, 2013. Ms. Hopkins filed a Petition for Review on July 8, 2014, and the self-insured employer filed a response on August 11, 2014. The Petition for Review was granted. On December 1, 2014, we issued a Decision and Order addressing the method used to calculate penalties. We concluded that the aggregation method is the proper method to calculate penalties for unreasonable delay in payment of time-loss compensation benefits under RCW 51.48.017. We rejected Ms. Hopkins' position that the minimum penalty of $500 provided under the statute be assessed for each semi-monthly or bi-weekly interval when time-loss compensation benefits are paid. The Board reversed the Department order dated August 30, 2013, and remanded the matter to the Department with instruction to recalculate all penalties due to Ms. Hopkins.

On December 15, 2014, Ms. Hopkins moved for reconsideration of the Decision and Order. She questions the Board's decision based on a failure to liberally construe the relevant statutes in order to reduce a worker's suffering and economic harm, improper consideration of the proportion of the delayed benefit to the amount of the penalty in the plain language of RCW 51.48.017.

She contends that the Board's Decision and Order not only fails to liberally construe the Act for the purpose of reducing her suffering and economic harm, it rejected her interpretation on the basis that it would cause too much economic harm ("exceptionally punitive") to the self-insured employer, when the Act does not give the Board the authority to consider the employer's economic harm when determining a worker's benefits.

Even assuming that it is proper to decide the issue based on proportionality of the delayed benefits to the penalty, Ms. Hopkins argues that her requested penalty of $23,362.41 is proportional. RCW 51.48.017 allows a $500 penalty even if one dollar of benefits is unreasonably

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delayed. Ms. Hopkins cites cases where courts have awarded an attorney fee almost equal to, or far exceeding, the judgment.

Ms. Hopkins next argues that penalties are to punish self-insured employers for unreasonable actions and to act as a deterrent for future unreasonable actions. Because self-insured employers are, almost by definition, multimillion dollar entities, she questions how a $900 or $2,000 penalty is a deterrent.

Finally, she proposes that RCW 51.48.017 and RCW 51.32.190(3) are not ambiguous but may be plainly read to support serial calculation of penalties. Benefits come due at regular semi-monthly or bi-weekly intervals. The Board must plainly read the statute to require serial calculation of penalties, rather than reaching a conclusion that the only way to calculate penalties is to aggregate them.

In Ms. Hopkins reply to the City of Vancouver's response to her motion, she asks the Board to take judicial notice of an order of the Department dated January 8, 2015, issued under the Board's remand to recalculate the penalty. The Department determined that the City of Vancouver had unreasonably delayed the payment of time-loss compensation for the period August 27, 2011, through July 31, 2013, for $27,645.41. The Department ordered the City of Vancouver to pay a penalty to Ms. Hopkins for $6,911.35 under RCW 51.48.017.

Ms. Hopkins contends this Department order undercuts the Board's legal rational for rejecting serial calculation of penalties. She questions whether the "exceptionally punitive" standard should be compared to the $3,851.65 of the Department's first calculation or the $27,645.41 of the most recent calculation. Ms. Hopkins contends that the method of calculation of penalties established by the Board in its Decision and Order does not provide her the sure and certain relief so that her economic suffering is reduced to a minimum.

First, we wish to explain that a liberal interpretation of the statute does not allow us to ignore the plain language of the statute. Our decision did not create an "exceptionally punitive" standard for determining whether a penalty amount is appropriate. Our decision was based on the language of the statute. We merely, and perhaps ill advisably, discussed "exceptionally punitive" in the context of an illustration. We did not intend that the language be interpreted as a standard for evaluating whether a penalty amount is appropriate. The amount of the penalty is clearly defined

by statute; the statute does not allow for the Department or Board to substitute an amount believed to be appropriate or proportional, even when providing the statute a liberal interpretation.

In addition, we believe Ms. Hopkins' arguments regarding the proportionality of the attorney fees awarded to the size of judgments in civil cases has no bearing to the issue before us. The penalty to be applied if a self-insured employer unreasonably delays or refuses to pay benefits as they become due is set by RCW 51.48.017 as $500 or 25 percent of the amount then due, whichever is greater. The setting of attorney fees, on the other hand, depends on a number of different factors, unique to the facts of each litigation. Awarding attorney fees makes the prevailing parties whole by reimbursing amounts obligated to be paid to their attorney. Penalties assessed for unreasonable delay in benefits under the Industrial Insurance Act do not serve a similar purpose.

As we noted in our Decision and Order, our interpretation of RCW 51.48.017 is supported by the plain language of the statute that requires the penalty equal to $500 or 25 percent of the amount then **due**. When the Department determined a penalty should be paid, the amount "then due" is the aggregate amount due. As we further noted, this method of penalty calculation is also supported by the legislative history. The penalties set forth in RCW 51.48.017 may not be increased beyond what the Legislature has authorized in order to penalize the self-insured employer in proportion to its size, as suggested by Ms. Hopkins.

Finally, we note that RCW 51.48.017 does not contain the only remedy available to "punish" self-insured employers for abusing the process. RCW 51.48 provides for a range of penalties for various forms of misbehavior by self-insured employers. Per RCW 51.14.080, the certification of a self-insured employer may be withdrawn for several reasons, including unreasonably making it necessary for claimant's to resort to proceedings against the employer to obtain compensation. RCW 51.14.090 provides that an employee may petition the Director of the Department for withdrawal of certification of a self-insurer or for corrective action by the Department. If RCW 51.48.017 provides for inadequate penalty for misbehaving self-insured employers, any change in the penalty structure is within the province of the Legislature and should not be accomplished through a strained reading of the statute.

Ms. Hopkins' motion for reconsideration of our Decision and Order dated December 1, 2014, is denied.

Dated: February 20, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY   Chairperson

/s/_____
JACK S. ENG   Member