Washington, David

PENALTIES (RCW 51.48.017)

Offsetting private insurance benefits against time-loss compensation

Where a worker has received benefits under the self-insured employer's private insurance program for an injury subsequently determined to be compensable under the Act, the employer cannot withhold from payments of time-loss compensation amounts already paid for the same period under the private program. Even though the union contract entitles the employer to reimbursement, RCW 51.32.040 and RCW 51.04.060 prohibit a "setoff" against time-loss compensation as a means of enforcing the worker's obligation to repay the private benefits. The self-insured employer's withholding of past due time-loss compensation to enforce its right of reimbursement constituted an unreasonable delay in the payment of benefits and the imposition of a penalty under RCW 51.48.017 was proper. ***….In re David Washington*, BIIA Dec., 67 458 (1986)** [dissent] [*Editor's Note*: *Overruled*, *In re Mitch Frerotte*, BIIA Dec., 99 18418 (2001).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID WASHINGTON	**)**	**DOCKET NO. 67,458**
	)	
CLAIM NO. S-301166	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, David Washington, by
Stiley and Kodis, per
Patrick K. Stiley

Employer, Kaiser Aluminum and Chemical Corporation, by
Winston and Cashatt, per
Michael J. Cronin

This is an appeal filed by the claimant on April 9, 1984 from a decision of the Department of Labor and Industries dated February 22, 1984 which declined to assess penalties against the self-insured employer, Kaiser Aluminum and Chemical Corporation, for alleged unreasonable delay of benefits, and expressed concern, but did not decide, that the manner in which benefits were paid to the claimant by the self-insured was not allowable according to the provisions of RCW 51.32.040. **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order issued on August 13, 1985 in which the decision of the Department dated February 22, 1984 was reversed, and this claim remanded to the Department with direction to issue an order directing the self-insured employer to pay to the claimant the amount wrongfully withheld, and assessing a penalty against the self-insured employer in an additional amount equal to 25% of the delayed time-loss compensation pursuant to RCW 51.48.017.

The stipulated facts comprising the Board record show this appeal to have arisen because of the action of the Department of Labor and Industries declining to impose a penalty against Kaiser Aluminum and Chemical Corporation, a self-insured employer under the state's Industrial Insurance Act. David Washington, the claimant, brought the appeal in an effort to secure a penalty against Kaiser.

On July 23, 1982, the Department had ordered Kaiser to pay Mr. Washington retroactive compensation of $16,002.27 as a temporarily totally disabled worker under the Act from 4/27/80 to 10/26/81. Two months later Kaiser's workers' compensation service agent sent a draft for $1,166.44 to Mr. Washington, through his attorney, and withheld the remaining $14,835.83. The withheld amount was in reimbursement for benefits previously paid to Mr. Washington during the same period under Kaiser's non-occupational accident and sickness program. Pursuant to their union contract, that program required employees who received benefits thereunder to pay them back if their disability was subsequently found to be occupational in nature.

Mr. Washington disagreed with Kaiser's method of offsetting, and fourteen months later, on December 6, 1983, his attorney requested the Department to assess a penalty under RCW 51.48.017 for alleged unreasonable delay in payment of time-loss benefits. The Department's letter of February 22, 1984, from which the instant appeal was taken, was the administrative response to that request. The fact that the decision not to assess the penalty was communicated through a means more informal than an "order," i.e., a letter not containing "appeal rights" language, is inconsequential. That was the essence of this Board's order of November 14, 1984, remanding this case to the hearing process. We did not therein determine our scope of authority to grant the relief requested.

Initially, and as rightfully pointed out in the Proposed Decision and Order, this Board must determine its authority in questions of this nature. In its Petition for Review the employer maintains that where the Department, i.e., the Director, refuses to assess a penalty under RCW 51.48.017, the matter simply comes to an end. It argues that the decision not to assess a penalty is one which lies within the sole discretion of the director because only the affirmative decision to assess a penalty is required to be made in the form of an appealable order. We are not persuaded by this argument. RCW 51.52.050 permits an aggrieved party to appeal "any action" or "any decision relating to any phase of administration" of the act. This is broad language indeed. It may include discretionary acts, although our scope of review of such acts may be limited. We do not agree, however, that the failure of RCW 51.48.017 to specify the scope of review permitted from the refusal to assess a penalty requires the conclusion pressed by Kaiser that such refusal therefore is one of "sole" discretion. Moreover, the employer's reliance on State ex rel Bates v. Board of Industrial Insurance Appeals, 51 Wn. 2d. 125 (1957) and Department of Labor and Industries v. Cook, 44 Wn. 2d. 671 (1954) to support its position is misplaced. Those cases are not supportive of the proposition advanced in Kaiser's argument. There, the court was dealing with whether omission of a right of court appeal by

the Department from this Board's orders was intentional by the legislature where it specifically provided for such appeal rights for others. In RCW 51.48.017 the legislature was not dealing with scope of review issues, but was setting forth a course of administrative action in the event of alleged unreasonable delay or refusal to pay benefits by a self-insurer. This lies squarely within "any action" or "any decision" on "any phase" of the Act's administration as contemplated under RCW 51.52.050.

Having found Mr. Washington's appeal from the decision of February 22, 1984 to be properly before us, we now turn to the scope of issues over which we can exercise jurisdiction. Kaiser's petition urges the Board to limit its inquiry to whether the Department abused its discretion in refusing to assess a penalty. It argues that the stipulated facts show no such abuse and that any inference made from such facts to find an unreasonable delay simply is unfounded.

We agree with Kaiser's argument insofar as the amount it actually paid, $1,166.44, is concerned. The stipulated facts show a 66 day period between the date the Department ordered Kaiser to pay time-loss and the date of the draft paying a portion of that obligation. No reason is included in the stipulated facts to explain the delay. Unless it can be held as a matter of law that a 66-day delay should always trigger a penalty, then none should be ordered here, at least against the amount actually remitted to Mr. Washington. We do not so hold.

The possible penalty on the remaining $14,835.83 is the real issue of the present dispute. The purpose of RCW 51.32.040 is to assure that benefits due an injured worker under the Act must first pass to that worker. Before anyone can make a claim against such proceeds, whether by execution, garnishment, attachment, assignment, or the like, those proceeds must first pass to that worker. Set-offs arising from the terms of union contracts, although not specifically mentioned by the statute, fall within the same genre of exemption as those specifically included. The right of Mr. Washington to receive industrial insurance payments directly without interference from creditors, is a benefit to which he is entitled and stands in this case as a burden to which Kaiser is subject. Under RCW 51.04.060, the employer cannot evade this burden in any fashion. The employer's right of restitution under its union contract may be valid, but its method of enforcement was not. In choosing to act unilaterally in the face of a legal obligation, and to set off its industrial insurance liability in an amount equal to a claim not reduced to judgment, Kaiser acted at its own peril.

We agree with the Proposed Decision and Order that Kaiser's withholding of funds as it did violated its duty under the Industrial Insurance Act. In that sense, it was unlawful and constituted an unreasonable delay in the payment of benefits. Consequently, a clear case is made for the application

of penalty provisions of RCW 51.48.017. Mr. Washington is entitled to receive 25% of the amount unreasonably delayed as a penalty against him employer.

As a final note, we are constrained to hold that the Proposed Decision and Order went beyond the issues before the Board in additionally directing the payment of the withheld amount. The issue before us is whether a penalty should have been assessed against Kaiser. The Department's order of July 23, 1982 required the self-insurer to pay. That order was not appealed and became res judicata sixty days after its communication to Kaiser. Parenthetically, we must add that had Kaiser exercised the foresight to appeal that order, we would not even be confronted with the instant appeal. Such an appeal would have provided reasonable grounds for the employer to delay issuance of any time-loss check and thereby have been insulated from possible penalty. Instead, Kaiser did nothing to clarify its liability and its chosen method of set-off, and it must now live with the consequences of that inaction. However, it would be inappropriate for this Board to further direct the payment of the amount withheld since the letter from which this appeal was taken made no decision on that specific obligation.

FINDINGS OF FACT

Findings 1 through 5 of the Proposed Decision and Order are hereby adopted as this Board's final Findings 1 through 5. Finding 6 is hereby amended to read as follows, and we add our Finding 7:

6. The self-insured employer's action in withholding temporary total disability benefits in the amount of $14,835.83 as a set-off against benefits previously paid to the claimant under a contractual, non-occupational disability program was violative of its statutory obligation to pay timely benefits under the Industrial Insurance Act and constituted unreasonable delay in the payment of those benefits to the claimant.

7. Payment by the self-insured employer of $1,166.44 in September, 1982 in partial compliance with the Department's order of July 23, 1982 did not constitute an unreasonable delay in the paying of benefits.

CONCLUSIONS OF LAW

Conclusion of Law No. 1 in the Proposed Decision and Order is hereby adopted as this Board's Conclusion No. 1. Conclusion No. 2 and the Order are hereby stricken, and we substitute the following:

2. The letter from the administrator of the self-insurance section of the Department of Labor and Industries dated February 22, 1984 communicating the Department's decision not to assess a penalty against the self-insured employer, constituted an incorrect determination in light of the statutory provisions of RCW 51.48.017, and this matter is remanded to the Department with direction to issue an order requiring the self-insured employer to pay to the claimant an amount equal to $3,708.96 as a

penalty of 25% of the amount of time-loss compensation unreasonably delayed by the self-insured employer's action in this claim.

It is so ORDERED.

Dated this 17th day of March, 1986.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
GARY B. WIGGS Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENTING OPINION

I have no quarrel with the Board majority's discussion from the beginning of its Decision through page 4, line 24, as to the factual background of this case, and the Board's jurisdiction to hear an appeal from a Department decision refusing to assess a penalty. [In passing, I would note that this issue has now been rendered moot in any case by amendments to RCW 51.48.017 passed by the 1985 Legislature (1985, c. 347,] 3), which make it clear that the Director's decision, whether it finds unreasonable delay and therefore assesses a penalty, or finds no unreasonable delay and therefore refuses to assess a penalty, shall be by a clearly appealable order under RCW 51.52.050].

Commencing with the discussion on a penalty for alleged unreasonable delay by reason of the employer's withholding of $14,835.83 as reimbursement for its previously paid non-industrial disability benefits, I completely part company with the majority. I think the majority's decision simply does not look at the realities of the situation here.

There are no Washington appellate court decisions addressing RCW 51.48.017 or setting any guidelines or standards on unreasonableness. However, a very similar statute in California's workers' compensation law has been judicially interpreted, and I think the standards so set forth are quite appropriate here. In State Compensation Insurance Fund v. Workers' Compensation Appeals Board, 130 Cal. App. 3d 933, 938 (1982), the court held that a "satisfactory excuse for delay in payment of disability benefits is genuine doubt from a medical or legal standpoint as to liability for benefits." (Emphasis added) And in Gallamore v. Workers' Compensation Appeals Board, 23 Cal. 3d 815, 828 (1979), the court held: "In penalty cases the Board should proceed with a view toward achieving a fair balance between the right of the employee to prompt payment of compensation benefits, and the

avoidance of imposition upon the employer or carrier of harsh and unreasonable penalties." (Emphasis added). These, in my view, are very well articulated guidelines.

Under the stipulated facts here, was there genuine doubt on the employer's part as to liability for time-loss compensation under the Workers' Compensation Act for the period here in issue (April 27, 1980 through October 26, 1981)? Of course there was, because at the very beginning of that period, the claimant made a claim for non-industrial accident and sickness benefits, contending his disability was from a non-industrial back injury occurring on April 25, 1980. The employer agreed with the claimant's position, and proceeded to promptly and regularly pay to the claimant non-industrial disability benefits, at the rate of $190.00 per week, for virtually the entire period in issue.

It was not until the Department finally issued its order of July 23, 1982, that it was determined that the non-industrial back injury constituted an aggravation of the claimant's April 4, 1979 industrial injury, and that time-loss compensation under the Act should be paid for the period in question. There is no explanation in the record as to when or why the claimant changed his position regarding the non-industrial nature of his disability during that period, or what administrative or investigative actions prompted the issuance of the Department's order of July 23, 1982. In any event, upon receipt thereof, the employer obviously still was entitled to have genuine doubt as to its correctness, and was not unreasonable in delaying compliance therewith during the 60-day statutory appeal period while considering the possibility of an appeal. Upon deciding to accept the Department's decision, Kaiser then promptly complied therewith on September 27, 1982 in a manner it deemed factually and legally proper.

At that point, what were the real practicalities of the situation? It was undisputed at that time that the claimant was entitled to $16,002.27 in time-loss compensation for the period from April 27, 1980 to October 26, 1981. It is undisputed that he had in fact received from Kaiser during that period, in prompt and regular weekly payments, a total of $14,835.83, albeit in the form of non-industrial disability benefits. The balance still owing to him, under the slightly higher rate of time-loss compensation, was $1,166.44, which we all agree was paid to him in a prompt manner following the final determination that the disability period in question should be an obligation of industrial insurance. What difference does it make that the great majority of the industrial compensation to which he was eventually found to be entitled (almost 93% of it) had been paid to him already out of the employer's non-industrial benefit "pocket," and the balance (less than 7%) was paid out of the employer's industrial benefit "pocket." He in fact did timely receive all the money to which he was entitled.

Looking at the matter another way, since it was not determined until July 23, 1982 that the period in issue was under industrial, rather than non-industrial, coverage, the claimant had in effect received in advance almost 93% of the time-loss compensation determined to be due him.

The claimant had a contractual obligation under his union's contract with Kaiser, that in such a situation he "must make restitution . . . of the non-occupational sickness and accident benefits." Isn't it eminently reasonable that such obligation should be effectuated by the employer's recoupment of the non-occupational benefits it had paid by the withholding method used here? I believe so. In Nelson Company v. Goodrich, 159 Wash. 189, 194 (1930), our Court, speaking generally to the right of recoupment, stated it "means the keeping back or stopping something which is otherwise due, because the other party to the contract has violated some duty evolving upon him in the same transaction." It appears here that there is effectively one "transaction" with two parts, namely, payment by Kaiser to the claimant of non-industrial disability benefits during a period of inability to work which later was determined by Departmental decision to be industrial-injury related, followed by monetary adjustment, in view of that determination, both to make claimant whole under the Act and to enable the employer to recoup its non-industrial benefit payments under the employer-union labor contract.

But the majority says the employer cannot utilize the method used here for recouping its non-industrial benefit payments, because the provisions of RCW 51.32.040 prohibit such method. The majority says that the claimant under this statute must receive the full industrial insurance payment directly "without interference from creditors," and that Kaiser could not offset against its industrial insurance liability the amount of "a claim not reduced to judgment."

I do not believe that RCW 51.32.040 was ever intended to apply to the situation here. We are not talking about protecting the claimant's industrial insurance payments "from creditors," we are talking about making sure that he has received in hand the total monetary amount of time-loss compensation to which he was entitled for the 18-month period in question. Indubitably, he has so received the correct total amount. I think it is erroneous to categorize Kaiser as a "creditor" here. As the employer of the claimant, Kaiser had statutory and contractual obligations to pay benefits to claimant for the period of his inability to work, either because of non-industrial cause or because of industrial cause -- but it had no obligation to pay both benefits for the same period of time, and then have to resort to some further type of legal action to attempt to seek restitution of the non-industrial benefit payments. The majority here cited no judicial authority for concluding that RCW 51.32.040 is applicable to the situation here; and of course there is no such case law authority.

At the very least, there is a genuine doubt from a legal standpoint that the employer was liable and obligated to pay the full industrial insurance time-loss amount in spite of having already paid the great majority of that amount in non-industrial benefit payments; and the principle of possible unjust enrichment clearly comes into play. Therefore, I cannot conclude that the employer's withholding of time-loss payments in the amount of the previously paid non-industrial payments constituted "unreasonable delay" of such payments under RCW 51.48.017.

In conclusion, I come back to the principle enunciated by the California court in Gallamore, supra, i.e., that in penalty cases the goal to be achieved is a fair balance between the employee's right to prompt payment of workers' compensation benefits, and the employer's right to not be subject to penalties of a harsh and unreasonable nature. Under the circumstances here, the claimant did in fact receive prompt payment of all the compensation to which he was entitled for the disability period in issue. Thus, in my view, any penalty against the employer would be harsh and unreasonable.

I would make final disposition of this appeal by simply affirming the Department's letter decision of February 22, 1984, refusing to assess any penalty.

Dated this 17th day of March, 1986.

/s/_____
PHILLIP T. BORK Member