Madrid, Frank

PENALTIES (RCW 51.48.017)

Unreasonable delay

The test of whether an employer's delay in paying benefits is "unreasonable" within the meaning of RCW 51.48.017, is "whether the employer had a genuine doubt from a medical or legal standpoint as to the liability for benefits." "[G]enerally a failure to pay because of a good faith belief that no payment is due will not warrant a penalty." ***….In re Frank Madrid*, BIIA Dec., 86 0224-A (1987)** [special concurrence] [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 87-2-045534. *Principal upheld, Taylor v. Nalley's Fine Foods*, 119 Wn. App 919 (2004).]

SCOPE OF REVIEW

Penalty assessment, Director's refusal to assess

The determination whether to assess a penalty is not vested solely in the discretion of the Director, and the Director's decision not to assess a penalty is therefore reviewable by the Board. ***….In re Frank Madrid*, BIIA Dec., 86 0224-A (1987)** [special concurrence] [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 87-2-04553-4.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FRANK C. MADRID	)	**DOCKET NOS. 860224-A, 860226-A & 860228-A**
	)	
CLAIM NO. S-547162	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Frank C. Madrid, by
Stephen R. Powell

Employer, Lakeside Industries, by
Rolland & O'Malley, per
Thomas O'Malley, James Rolland and Wayne Williams

Department of Labor and Industries, by
The Attorney General, per
Sidney Stillerman Swan and Zimmie Caner, Assistants

These are cross appeals filed by the claimant, Frank C. Madrid, from three orders of the Department of Labor and Industries issued on December 24, 1985 and from a letter issued by the Department on December 17, 1985. The three Department orders placing the claimant on the pension rolls effective March 7, 1985, denying the self-insured employer second injury fund relief, and directing the self-insured employer to submit funds to the Department pursuant to RCW 51.44.071(1) or (2) are **AFFIRMED**. The letter of December 17, 1985, denying the claimant's request to assess a penalty against the self-insured employer is also **AFFIRMED**.

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 January 29, 1987 in which the three orders of the Department dated December 24, 1985 were sustained, and the Department letter dated December 17, 1985 was reversed and remanded to the Department with direction to issue an order assessing the self-insured employer penalties pursuant to the provisions of RCW 51.48.017.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The propriety of the Department orders of December 24, 1985 which placed the claimant on the pension rolls effective March 7, 1985, denied the self-insured employer second injury fund relief, and directed the self-insured employer to submit funds to the Department pursuant to RCW 51.44.070(1) or (2) was determined by a separate Proposed Decision and Order of January 26, 1987 and our Order

Denying Petition for Review thereof on April 1, 1987, entered in the appeals filed by the employer and assigned Docket Nos. 860224, 860226 and 860228. In those appeals the three Department orders were sustained.

In these cross appeals by the claimant he has not objected to the Department orders of December 24, 1985 except to the extent that they, viewed in combination with the Department letter of December 17, 1985, failed to assess a 25% penalty against the self-insured employer for its alleged failure to pay benefits when due. The sole issue now before this Board, therefore, is whether the Department was correct in denying the claimant's request to assess a penalty against the self-insured employer, pursuant to RCW 51.48.017, for a failure to pay benefits in a timely manner.

The Proposed Decision and Order adequately sets forth the evidence material to the issue presented. Briefly, that evidence establishes that the claimant was injured on October 1, 1982 while in the course of his employment with Lakeside Industries. Thereafter he received time- loss compensation until approximately October 14, 1983. At that time he returned to work as a traffic control supervisor's assistant, a job specially tailored to his physical limitations and approved by his attending physician. The claimant continued in this job until approximately November 9, 1983 when, due to inclement weather, he was laid off. The claimant was never called back to work but did apply for and receive unemployment compensation. As part of his application for unemployment compensation he certified to the Employment Security Department that he was physically capable of returning to work. No further certification of the claimant's temporary total disability was supplied to the employer by the claimant's attending physician.

On October 16, 1984 the employer received a copy of a vocational assessment prepared by Tony Choppa, a vocational rehabilitation counselor. Mr. Choppa concluded in that assessment that the claimant was totally and permanently disabled. On November 21, 1984 the employer requested its own vocational evaluation from Stan Owings. Mr. Owings' report was received by the employer on February 5, 1985 and in his report he concluded that the claimant was not capable of "suitable gainful employment." Thereafter, on March 6, 1985, the employer paid time-loss compensation for the period October 21, 1984 through March 4, 1985. On April 25, 1985 the Department issued an order directing the self-insured employer to pay time-loss compensation for the earlier period of November 10, 1983 through October 20, 1984. The self-insured employer timely protested this order, which was thereafter reaffirmed by an order of July 22, 1985. On August 2, 1985 the self-insured employer paid, in full, the retroactive time-loss compensation as directed by the Department.

The employer first challenges this Board's authority or jurisdiction to review a decision by the director of the Department of Labor and Industries denying a claimant's request to assess a penalty under RCW 51.48.017. It is the employer's contention that the determination to assess a penalty under RCW 51.48.017 is vested solely in the discretion of the director. We agree with our Industrial Appeals Judge's resolution of this threshold question. Specifically, we note that, since its original enactment in 1971, the statute has required that the "order" assessing the penalty "conform to the requirements of RCW 51.52.050." Furthermore, the 1985 amendments to RCW 51.48.0178 Laws of 1985, Ch. 347, Sec. 3, (effective July 28, 1985) added the following language to the statute:

> The director shall issue an order determining whether there was an unreasonable delay or refusal to pay benefits within thirty days upon the request of the claimant.

This amendatory language, considered with the therefore existing statutory language, clearly evidences a legislative intent that decisions of the director under RCW 51.48.017 shall be reviewable by the Board. The Legislature's use of the term "order" contemplates that a director's decision, whether it to be assess a penalty or to not assess a penalty, constitutes an appealable decision within the meaning of RCW 51.52.050. While the December 17, 1985 letter from the Department fails to comply with the requirements of RCW 51.52.050 (i.e., it fails to advise the claimant of his appeal rights in ten point black faced type) this is not a defect fatal to the Board's jurisdiction when the aggrieved party does in fact timely appeal the decision. We conclude, therefore, that we have jurisdiction to decide the issue of whether or not the self-insured employer unreasonably delayed or refused to pay benefits under the Act.

RCW 51.48.017 provides in its entirety:

> If a self-insurer unreasonably delays or refuses to pay benefits as they become due there shall be paid by the self-insurer upon order of the director an additional amount equal to five hundred dollars or twenty-five percent of the amount then due, whichever is greater, which shall accrue for the benefit of the claimant and shall be paid to him with the benefits which may be assessed under this title. The director shall issue an order determining whether there was an unreasonable delay or refusal to pay benefits within thirty days upon the request of the claimant. Such an order shall conform to the requirements of RCW 51.52.050.

We believe the test of whether an employer's delay or refusal to pay benefits was "unreasonable" within the meaning of the above statute, is whether the employer had a "genuine doubt from a medical or legal standpoint as to the liability for benefits." State Compensation Insurance Fund v. Workers'

Compensation Appeals Board, 130 Cal. App. 3rd 933, 182 Cal. Rep. 171 (1982). Further, we accept the proposition as stated by Professor Larson that "generally a failure to pay because of a good faith belief that no payment is due will not warrant a penalty." Larson, Law of Workmens' Compensation, Section 83.41(b)(2). Applying those principles to the circumstances of this case, we believe the employer has demonstrated that any delay in the payment of benefits was not "unreasonable".

Although the claimant's receipt of unemployment compensation and his certification that he was ready, able, and willing to accept gainful employment does not, ipso facto, render the claimant ineligible for time-loss compensation, the fact that he was receiving unemployment compensation certainly made it reasonable for the self-insured employer to withhold payment of time-loss compensation pending an investigation of the claimant's eligibility for that benefit. Further, we find it significant that following the claimant's layoff in November 1983 the employer was not provided with any certification from the attending physician of the claimant's inability to be gainfully employed. WAC 296-20-01002 provides that:

> If after a trial period of reemployment the worker is unable to continue such work, his time-loss compensation will be resumed upon certification by the attending doctor.

In the absence of such medical certification and in light of the claimant's claimed eligiblity for unemployment compensation, we do not think it was unreasonable for the employer to not pay time-loss compensation for the period prior to the date it received Mr. Choppa's vocational assessment indicating the claimant was totally disabled.

Following receipt of Mr. Choppa's vocational report on October 16, 1984, the employer requested its own vocational evaluation of the claimant's ability to be employed. We believe the employer was entitled to seek a further independent assessment of the claimant's eligibility for temporary total disability benefits. Within thirty days of the date it received Mr. Owings' report, the employer made payment of time-loss compensation to the claimant for the period commencing October 21, 1984. Neither the delay in payment of benefits following receipt of Mr. Owings' report nor the refusal to pay benefits for more than the period for which benefits were then paid were unreasonable.

The employer did dispute the claimant's eligibility for time-loss compensation for the earlier period of November 10, 1983 through October 20, 1984. In light of the claimant's receipt of unemployment compensation and the lack of any medical certification of the claimant's inability to be

gainfully employed during that time, we believe the employer's refusal to pay these benefits prior to receipt of the Department's April 25, 1985 order directing the payment of such benefits was done in good faith. The further delay in the payment of these benefits between April 25, 1985 and August 2, 1985 was a result of the employer's exercise of its right to protest the order of the Department directing it to pay the disputed time-loss compensation. Unless an employer's protest is frivolous, we should not penalize an employer for exercising its legal rights conferred by RCW 51.52.050.

Therefore, after consideration of the Proposed Decision and Order and the Petition for Review filed thereto and a careful review of the entire record before us, we are persuaded that the Department's decision as communicated in its December 17, 1985 letter to the claimant is correct and should be affirmed.

The Board makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On October 12, 1982, an accident report was filed with the Department of Labor and Industries on behalf of the claimant, Frank C. Madrid, alleging an industrial injury on October 1, 1982 while in the course of his employment with Lakeside Industries. On November 3, 1982 the Department issued an order allowing the claim. On April 25, 1985 the Department issued an order directing payment of time-loss compensation for the period from November 10, 1983 through October 20, 1984. On May 10, 1985, the Department issued an order reducing the claimant's monthly benefits based upon the Social Security Administration's offset. On May 6, 1985 a letter of protest and request for reconsideration was filed on behalf of the employer from the Department order of April 25, 1985. On May15, 1985 the Department issued an order adhering to the provisions of its prior order dated April 25, 1985. On May 17, 1985 the Department issued an order correcting and superseding the May 10, 1985 order regarding the Social Security Administration's offset. On July 10, 1985 a letter of protest and request for reconsideration was filed on behalf of the employer from the Department order of May 17, 1985. On May 21, 1985 a letter of protest and request for reconsideration was filed on behalf of the employer from the Department order of May 15, 1985. On July 22, 1985 the Department issued an order adhering to the provisions of its prior orders dated May 12, 1985 and May 17, 1985. On December 17, 1985 the Department issued a letter to the claimant denying his request that penalties be assessed against the self-insured employer as provided for by the Industrial Insurance Laws. On December 24, 1985, the Department issued an order finding the claimant totally and permanently disabled, placing the claimant on the pension rolls effective March 7, 1985 and directing that $5,000.00 of a previously paid partial disability award be charged against the pension reserve and the monthly benefit be reduced

accordingly. On December 24, 1985, the Department issued a second order denying the employer's request for second injury fund relief. On December 24, 1985 the Department issued a third order requiring the self-insured employer to submit to the Department the sum of $118,613.20 the reserve required to pay the pension or pay the accrued benefits from March 7, 1985 to December 15, 1985 in the amount of $9,368.26 plus a cash deposit equal to three times the monthly benefits totaling $3,021.99 and to file the required bond in an amount to be determined by the Insurance Commissioner. On January 21, 1986, notices of appeal were filed with the Board of Industrial Insurance Appeals on behalf of the employer from all three Department orders of December 24, 1985. On February 5, 1986, the Board issued orders granting the appeals and assigning them Docket Nos. 860224, 860226 and 860228 and directing that proceedings be held on the issues properly raised in the appeals. On February 12, 1986, notices of cross appeal were filed with the Board on behalf of the claimant from all three Department orders of December 24, 1985 and from the letter of the Department dated December 17, 1985. On February 27, 1986, the Board issued orders granting the cross appeals, assigning Docket Nos. 860224-A, 860226-A, and 860228-A and directing that proceedings be held on issues properly raised in the cross appeals.

2. On October 1, 1982, while in the course of his employment with Lakeside Industries, the claimant was run over by a truck. As a result of this injury, the claimant suffered multiple bone and soft tissue injuries to the chest, right lower extremity, left upper extremity, jaw and skull and required medical treatment.

3. The claimant returned to work on October 14, 1983, worked until approximately November 9, 1983, at which time he was laid off due to inclement weather.

4. At no time subsequent to November 9, 1983 was the employer provided with any certification from the attending physician as to the claimant's continued inability to perform substantial gainful employment.

5. On October 16, 1984, the self-insured employer received a vocational assessment determining that the claimant could not return to gainful employment.

6. On November 21, 1984 the self-insured employer requested a second vocational evaluation which was received on February 5, 1985, and found the claimant not capable of suitable gainful employment.

7. On March 6, 1985, the self-insured employer paid time-loss compensation benefits for the period October 21, 1984 through March 4, 1985, in the amount of $4,520.10.

8. On April 25, 1985, the Department issued an order directing the self-insured employer to pay time-loss compensation benefits from November 10, 1983 through October 20, 1984.

9. On August 2, 1985, after exercising it legal rights to protest the April 25, 1985 order, the self-insured employer paid time-loss compensation benefits to the claimant in the amount of $13,218.69 for the full period from November 10, 1983 to October 20, 1984.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction of the subject matter and the parties to this appeal.

2. The three Department orders issued on December 24, 1985, placing the claimant on the pension rolls effective March 7, 1985, denying the self-insured employer second injury fund relief, and directing the self-insured employer to submit to the Department of Labor and Industries the necessary funds pursuant to RCW 51.44.070(1) or (2) are correct and are affirmed.

3. The self-insured employer did not unreasonably delay or refuse to pay time-loss compensation benefits to the claimant as they became due, within the meaning of the provisions of RCW 51.48.017.

4. The Department letter dated December 17, 1985 which denied the claimant's request to assess a penalty against the self-insured employer pursuant to the provisions of RCW 51.48.017, is correct and should be affirmed.

It is so ORDERED.

Dated this 4th day of September, 1987.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member

SPECIAL EXPLANATORY STATEMENT

I have joined with Chairperson Harmon in signing the foregoing Decision, because I agree completely with the disposition reached on the only issue truly decided thereby, namely, that the self-insured employer not be assessed a penalty in this case under the provisions of RCW 51.48.017.

However, I am not fully in accord with Conclusion of Law No. 2 above, even though recognizing that technically it should be entered in the manner set forth, in light of the procedural status of these cross-appeals by the claimant.

Specifically, I want it understood that I do not join in the affirmance of the Department order of December 24, 1985 denying the employer second injury fund relief. That was actually the sale issue tried in the employer's appeals under Dockets 860224, 860226 and 860228. I did not join the other two Board members in the Order Denying Petition for Review therein on April 1, 1987, because I felt persuasive evidence was presented for second injury fund relief. In any event, that issue is still awaiting final determination, in view of the employer's appeal pending in Snohomish County Superior Court from the Board majority's April 1, 1987 Order.

Dated this 4th day of September, 1987.

/s/_____
PHILLIP T. BORK, Member