

Levings, Agnes

[PENALTIES \(RCW 51.48.017\)](#)

Unreasonable delay

The self-insured employer was assessed a penalty for unreasonable delay in the payment of time-loss compensation benefits pursuant to a Board Order on Agreement of Parties. The Department issued a ministerial order based on the Board's order that included the statement of appeal rights, an indication the order would not be final for 60 days. The self-insured employer paid the benefits 34 days after receipt of the order, which was not unreasonable because the statutes do not provide a time frame in which the benefits should be paid, and the ministerial order suggested that the employer should have at least 60 days in which to pay the benefits. ...***In re Agnes Levings, BIIA Dec., 99 13954 (2000)*** [dissent] [*Editor's Note: Overruled, In re Jackie Washburn, BIIA Dec., 03 11104 (2004).*]

Scroll down for order.

1 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
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3 no prejudicial error was committed and the rulings are affirmed.
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5 The Proposed Decision and Order accurately sets out the history in this case. To briefly
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7 restate it, the self-insured employer appealed the Department order requiring the self-insured
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9 employer to pay time loss compensation for the period September 13, 1995 through June 16, 1997.
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11 That issue was resolved by an Order on Agreement of Parties issued by this Board on
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13 September 14, 1998. The Board Order on Agreement of Parties required the self-insured employer
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15 to pay time loss compensation for the period February 14, 1996 through July 24, 1997. On
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17 October 1, 1998, the Department issued its ministerial order following the terms of the Order on
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19 Agreement of Parties. The Department's ministerial order contained language that indicated that
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21 the order would become final 60 days after it was received by a party unless a written request for
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23 reconsideration or an appeal was filed within that time limit. This is the standard language
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25 contained on orders and notices issued by the Department of Labor and Industries.
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27 The self-insured employer's claims administration firm received the Department's ministerial
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29 order on October 7, 1998. The claims administrator issued a check for payment of the back due
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31 time loss compensation on November 10, 1998. The self-insured employer acted and paid the time
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33 loss compensation 34 days after receiving the ministerial order from the Department of Labor and
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35 Industries. On January 12, 1999, the Department issued an order finding that the self-insured
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37 employer had unreasonably delayed the payment of time loss compensation and assessed a
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39 penalty in the sum of \$2,350.48. This appeal follows from the January 12, 1999 Department order.
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41 We have granted review because on the facts as presented in this case we do not believe it
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43 is reasonable for the Department to issue an order assessing a penalty against the self-insured
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45 employer for delay in payment of benefits. We do not believe there is clear notice to the
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47 self-insured employer on when to act following the entry of a Department ministerial order that

1 follows an Order on Agreement of Parties issued by this Board. The central problem is the fact that
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3 the ministerial order issued by the Department of Labor and Industries contains language informing
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5 the parties that the order will not become final for 60 days and that the parties may protest or
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7 appeal the order.

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9 A number of statutes address enforcement of compensation orders. RCW 51.32.215
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11 pertains to enforcement of orders against the Department of Labor and Industries. This statute
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13 allows the Department 60 days after the compensation order has become final before enforcement
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15 action can be instituted by the worker or the beneficiary. RCW 51.32.200 pertains to self-insured
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17 employers. This statute provides that if a self-insured employer fails to comply with a compensation
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19 order that has become final and is not subject to review or appeal, then an enforcement action can
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21 be instituted against the self-insured employer. There is no time limit set out in RCW 51.32.200 for
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23 the enforcement procedure. RCW 51.48.017, the penalty statute, uses different language. This
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25 statute provides that if a self-insured employer unreasonably delays or refuses to pay benefits as
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27 they become due, a penalty can be assessed.

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29 Our concern is that nowhere in the Industrial Insurance Act is there a provision that gives
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31 notice to a self-insured employer that a 34-day delay in paying benefits, after a ministerial order has
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33 been issued to comply with a Board Order on Agreement of Parties, would subject the self-insured
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35 employer to a penalty. It is reasonable to assume, given the above-referenced statutes, that the
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37 self-insured employer would have at least the 60-day appeal period prior to the order becoming
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39 final, in which to pay the benefits.

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41 While a Department ministerial order that follows a Board Order on Agreement of Parties is
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43 not usually subject to appeal because it is an agreed determination, it is subject to review for
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45 accuracy. Where the language of an order tells all the parties that it will not be final for 60 days, the
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47 parties should be able to rely on that and not suffer any harm. On the facts in this case the

1 self-insured employer should not be penalized because it read and believed what the Department
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3 of Labor and Industries put in the order.
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5 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto,
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7 and a careful review of the entire record before us, we are persuaded that the Department order of
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9 March 18, 1999, which assessed a penalty against the self-insured employer in the sum of
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11 \$2,350.48 for unreasonably delaying payment of compensation, is incorrect and should be reversed
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13 and this matter remanded to the Department with instructions to find that the self-insured employer
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15 did not unreasonably delay payment of compensation for the period February 14, 1996 through
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17 July 24, 1997, and to cancel the penalty assessed against the self-insured employer in the sum of
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19 \$2,350.48.
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21 **FINDINGS OF FACT**

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- 23 1. On April 12, 1993, the Department of Labor and Industries received an
24 application for benefits on behalf of the claimant, Agnes G. Levings,
25 alleging that she had been injured during the course of her employment
26 with Sears Roebuck & Company (hereafter Sears) on February 15,
27 1993. The Department allowed the claim by order dated April 28, 1993,
28 and benefits were paid.
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30 On June 17, 1997, the Department directed Sears to pay Ms. Levings
31 time loss compensation for the period from September 13, 1995 through
32 June 16, 1997, and to continue such payments so long as the claimant's
33 temporary total disability was certified by her attending physician. On
34 July 17, 1997, Sears protested the order of June 17, 1997. On July 24,
35 1997, the Department affirmed the order of June 17, 1997.
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37 On October 14, 1997, Sears filed a Notice of Appeal with the Board of
38 Industrial Insurance Appeals from the July 24, 1997 order. The appeal
39 was received at the Department on September 25, 1997. The Board
40 granted the appeal on November 14, 1997, assigned Docket
41 No. 97 8148.
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43 On September 14, 1998, the Board issued an Order on Agreement of
44 Parties in appeal assigned Docket No. 97 8148. This order reversed the
45 order of the Department dated July 24, 1997, and remanded the claim to
46 the Department with directions to issue an order that required Sears to
47 pay the claimant time loss compensation for the period from

1 February 14, 1996 through July 24, 1997, and to continue such
2 payments as certified by Ms. Levings' attending physician.
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4 The Department issued an order on October 1, 1998, which complied
5 with the Board's Order on Agreement of Parties.
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7 On January 12, 1999, the Department issued an order that determined
8 that Sears had unreasonably delayed payment of time loss
9 compensation to the claimant for the period of time from February 14,
10 1996 through July 24, 1997, and directed the self-insured employer to
11 pay Ms. Levings a penalty in the sum of \$2,350.48. Sears received the
12 January 12, 1999 order on January 13, 1999. On March 12, 1999,
13 Sears protested the order of January 12, 1999. On March 18, 1999, the
14 Department affirmed the order dated January 12, 1999. On April 16,
15 1999, Sears filed a Notice of Appeal with the Board of Industrial
16 Insurance Appeals from the March 18, 1999 order. The Board granted
17 the appeal on May 13, 1999, assigned Docket No. 99 13954, and
18 directed that further proceedings be held.
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- 20 2. On September 14, 1998, this Board issued an Order on Agreement of
21 Parties in the appeal assigned Docket No. 97 8148 that directed the
22 Department to issue an order that required Sears to pay Ms. Levings
23 time loss compensation for the period from February 14, 1996 through
24 July 24, 1997. Sears was party to the agreement and agreed that the
25 Board should issue the Order on Agreement of Parties.
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- 27 3. The September 14, 1998 Board Order on Agreement of Parties in
28 Docket No. 97 8148 was received by Sears via its third party workers'
29 compensation administrator, Kemper Insurance Company, at Kemper's
30 Seattle office on September 18, 1998.
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- 32 4. On October 1, 1998, the Department of Labor and Industries issued the
33 order it was required to issue by the Board Order on Agreement of
34 Parties dated September 14, 1998. The Department's order was fully in
35 compliance with the Board's order.
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- 37 5. Sears, via Kemper, received the October 1, 1998 Department order on
38 October 7, 1998.
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- 40 6. On November 9, 1998, the claim adjudicator for Kemper in charge of
41 Ms. Levings' claim with Sears entered data in her computer in her
42 Seattle office that directed that a check that complied with the Board's
43 Order on Agreement of Parties should be issued on November 10,
44 1998, by the Illinois office of Kemper.
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- 46 7. Sears, via Kemper, issued a check to Ms. Levings in compliance with
47 the Board Order on Agreement of Parties on November 10, 1998, but

1 the order was sent to the claimant at an incomplete address and was
2 not delivered to the claimant.

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4 8. On November 23, 1998, Kemper's Seattle office mailed a check in
5 compliance with the Board's Order on Agreement of Parties to
6 Ms. Levings at her correct address and the claimant received the check
7 in the due course of the United States Postal Service.

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9 **CONCLUSIONS OF LAW**

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11 1. The Board of Industrial Insurance Appeals has jurisdiction over the
12 parties to and the subject matter of this appeal.
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14 2. As the term is used in RCW 51.48.017, Sears did not unreasonably
15 delay payment of the benefits it agreed to pay Ms. Levings in the Board
16 appeal assigned Docket No. 97 8148.
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18 3. The order of the Department of Labor and Industries dated March 18,
19 1999, is incorrect and is reversed. This claim is remanded to the
20 Department of Labor and Industries with direction to enter an order
21 finding that the self-insured employer, Sears Roebuck & Company, did
22 not unreasonably delay compensation due the claimant for the period
23 February 14, 1996 through July 24, 1997, and to cancel the penalty
24 assessed against the self-insured employer in the sum of \$2,350.48.

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26 It is so ORDERED.

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28 Dated this 28th day of August, 2000.

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30 BOARD OF INDUSTRIAL INSURANCE APPEALS

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34 /s/ _____
35 THOMAS E. EGAN Chairperson

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39 /s/ _____
40 JUDITH E. SCHURKE Member

1 **DISSENT**

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3 The majority focuses on a technical reading of the Industrial Insurance Act and elevates
4 procedure over substance in order to reward a self-insured employer for unreasonable delay in
5 payment of benefits. Therefore, I must dissent.
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9 The majority accurately sets forth the facts in this case regarding the Board Order on
10 Agreement of Parties, in which the self-insured employer agreed to pay time loss compensation
11 benefits. But the majority misses the point in this appeal. The point is that the self-insured
12 employer knew, on September 14, 1998, the date of the Board Order on Agreement of Parties, that
13 it had agreed to pay the time loss compensation benefits for the period February 14, 1996 through
14 July 24, 1997. The Department of Labor and Industries' ministerial order, in compliance with our
15 Order on Agreement of Parties, was issued on October 1, 1998. The self-insured employer actually
16 paid the time loss compensation benefits on November 10, 1998. There was a further delay
17 caused by the self-insured employer using an incorrect address to mail the benefits.
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27 The self-insured employer could well have paid the benefits on September 14, 1998. There
28 was no legal reason why the benefits should have been delayed beyond September 14, 1998. But
29 assuming that the self-insured employer wished to wait until the Department of Labor and Industries
30 issued its ministerial order in compliance with our Board order, the payment should have been paid
31 on October 7, 1998, the date that the self-insured employer's claims administration firm received
32 the Department ministerial order.
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39 The only logical reason for the self-insured employer's delay in paying the benefits after
40 October 7, 1998, is the benefit that the self-insured employer can obtain by retaining control of the
41 monies. While it may not amount to a large sum in any one case, the practice of delaying benefits
42 one or two months results in a monetary benefit in the form of interest earned on the benefits, which
43 directly benefits the self-insured employer.
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A self-insured employer such as Sears Roebuck & Company, which seeks to profit on the injury and pain and suffering by workers in this state, should be punished, and not rewarded. That is the purpose of RCW 51.48.017. The majority sends a signal to all self-insured employers that a two-month or more delay in payment of benefits is acceptable practice. I ask the majority, "How is the injured worker to buy food and pay the rent, and why can't the self-insured employer part with the monies it agreed was due to the worker?" There is no satisfactory answer.

I would adopt the well-reasoned, articulate, and legally correct Proposed Decision and Order and affirm the Department order that assessed a penalty against the self-insured employer.

Dated this 28th day of August, 2000.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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