Eyrich, Emily

PENALTIES (RCW 51.48.017)

Unreasonable delay penalty as benefit

A penalty order as provided by RCW 51.48.017 is also a benefit within the meaning of that statute such that an unreasonable delay in paying the penalty by itself is grounds for imposition of a further penalty. **….*In re Emily Eyrich*, BIIA Dec., 11 22230 (2013)**
[*Editor's Note*: The Board's decision was appealed to Kitsap County Superior Court, Nos. 13-2-00111-1 and 13-2-00129-4.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EMILY J. EYRICH	)	**DOCKET NO. 11 22230**
	)	
CLAIM NO. SA-89875	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Emily J. Eyrich, by
Casey & Casey, P.S., per
Carol L. Casey

Self-Insured Employer, Manor Care, Inc., by
Wallace, Klor & Mann, P.C., per
Lawrence E. Mann

Department of Labor and Industries, by
The Office of the Attorney General, per
Kaylynn What, Assistant

The claimant, Emily J. Eyrich, filed an appeal with the Board of Industrial Insurance Appeals on November 16, 2011, from an order of the Department of Labor and Industries dated November 4, 2011. In this order, the Department determined there was no unreasonable delay on the part of Manor Care, Inc., in the payment of penalties as directed by the Department on July 12, 2011. The request for a penalty was denied. The Department order is **REVERSED AND REMANDED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on May 25, 2012, in which the industrial appeals judge affirmed the Department order dated November 4, 2011. We have granted review because we conclude that: (1) a penalty ordered as provided by RCW 51.48.017 is also a "benefit" within the meaning of that statute such that an unreasonable delay in paying the penalty as it becomes due may itself be grounds for imposition of a further penalty; (2) the 45-day delay between the employer's receipt of the Department order imposing the penalty and its payment by the self-insured employer constituted an unreasonable delay in the payment of that benefit; and (3) WAC 296-15-266 is not applicable because it is in direct conflict with RCW 51.52.050(2)(b), as well as being inconsistent with the holding of our Supreme Court in *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739 (1981). We find that no genuine issue of material fact exists, in addition, we grant summary judgment to the

non-moving party, Ms. Eyrich, reverse the November 4, 2011 Department order, remand the matter to the Department to calculate the additional penalty due and owing the claimant, and direct the self-insured employer to pay the additional penalty.

PROCEDURAL AND EVIDENTIARY MATTERS

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

This matter comes before us for determination based on summary judgment motions filed on January 23, 2012, by Manor Care, Inc., the self-insured employer, and on January 30, 2012, by the Department of Labor and Industries. Ms. Eyrich filed a responsive brief to these motions, although she did not file a summary judgment motion herself. The self-insured employer's motion included four exhibits and two affidavits in support of its motion. Neither the Department's motion nor the claimant's response included any evidentiary exhibits, affidavits, or other material to be considered as evidence as provided in CR 56. In the Proposed Decision and Order at page 2, the industrial appeals judge included a list of documents presented by the parties as evidence or argument. We adopt this list as stated by the industrial appeals judge with the following corrections:

> 2. The Department order was issued on July 12, 2011.
>
> 3. This document is the self-insured attorney's copy of a Department letter dated August 10, 2011, to all parties noting its receipt of a Protest and Request for Reconsideration of the July 12, 2011 order.
>
> 6. The affidavits of Brad Garber, dated January 17, 2012; and Kristi Milkovich, dated January 13, 2012. There was no self-insured employer's Exhibit 5 included with its summary judgment motion.

We acknowledge that our decision in this matter has the same effect as granting a motion for summary judgment made by Ms. Eyrich even though she did not file such a motion. CR 56 does not prohibit a court from granting summary judgment to a non-moving party when there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law. Our Supreme Court noted, in *Leland v. Frogge*, 71 Wn.2d 197 (1967) at page 201, that authority exists for a court to grant summary judgment for a non-moving party in two situations: when the judgment would be one of dismissal or the relief in question was sought by and was due to the non-moving party. In this case, the claimant has vigorously advocated throughout the proceedings that she is entitled to the additional penalty. We conclude from the evidence presented, entirely

consisting of documents submitted by the self-insured employer, that Ms. Eyrich is entitled to the relief she is seeking, that is, the imposition of the additional penalty.

ISSUES

1. Is a penalty assessed against a self-insured employer as provided by RCW 51.48.017 itself a "benefit" to the worker within the meaning of the Industrial Insurance Act?

2. If the answer to the first question is "yes," did the self-insured employer unreasonably delay paying the penalty, thereby requiring imposition of a further penalty as provided by that statute for that delay?

EVIDENCE PRESENTED

On July 12, 2011, the Department issued an order in which it found the self-insured employer had unreasonably delayed the payment of $8,556.90 of time-loss compensation benefits due and owing Ms. Eyrich for the period of May 29, 2009, through August 31, 2010, and directed it to pay her an additional $2,139.22, consisting of a penalty assessed as provided by RCW 51.48.017. The amount of the additional payment equaled 25 percent of the delayed benefits consistent with the penalty prescribed by that statute. On or about August 8, 2011, the self-insured employer protested this order. On October 6, 2011, the Department issued another order in which it affirmed its July 12, 2011 order, including the imposition of the penalty. On October 8, 2011, the third party administrator of the self-insured employer received its copy of the October 6, 2011 order. On October 26, 2011, Ms. Eyrich requested the imposition of the further penalty at issue here due to the self-insured employer's delay in paying the penalty stated in the July 12, 2011, and October 6, 2011 orders. On November 4, 2011, the Department issued the order under appeal, in which it denied Ms. Eyrich's request for the additional penalty against the self-insured employer, this time for its delay in paying the earlier penalty. On November 22, 2011, the self-insured employer's third party administrator mailed Ms. Eyrich a check for the full amount of the penalty assessed against it in the July 12, 2011, and October 6, 2011 orders.

DISCUSSION

This appeal raises again the question as to what exactly are "benefits" under the Industrial Insurance Act, this time in the context of whether a monetary penalty against a self-insured employer to be paid to the injured worker is a "benefit" within the meaning of RCW 51.48.017, the penalty statute. RCW 51.48.017 states:

> 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 or her 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.

The term "benefit" is not defined anywhere in Title 51 RCW. *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 742 (1981). The question has been considered a number of times by this Board and the courts but not in the context before us here.

In *Tradewell Stores*, the supreme court concluded that RCW 51.52.130, which directed the time that payment be made for witness and attorneys' fees when a Board order is appealed to the courts, did apply as a matter of law to court cases in self-insured claims as well as state fund claims. (Before 1982, RCW 51.52.130 did not include a provision specifically mentioning self-insured employers.) In that case, the employer argued that attorneys' fees were not benefits within the meaning of the Act. The court stated at pages 742-743:

> [1] Contrary to the assertion of the employers, this case does concern benefits. Although the term "benefit" is nowhere defined in the industrial insurance statutes (RCW Title 51), it is clear the term refers to payment or compensation paid to the injured worker or his beneficiaries. RCW 51.32. It refers to amounts of money received. The contention of the employers that attorney and witness fees are not benefits or compensation under the act misses the point. It is not the attorney and witness fees which are benefits; rather, it is the increased benefits received when those fees do not have to be paid by the worker. For any worker who qualifies to receive attorney and witness fees under RCW 51.52.130, the actual benefits obtained in the appeal will be increased pro tanto by the amount of attorney and witness fees the worker does not have to pay. Using this analysis, it is incontestable that the award of attorney and witness fees under the provisions of RCW 51.52.130 does benefit the worker covered by industrial insurance.
>
> [2] Once the real nature of RCW 51.52.130 is correctly stated, it is readily apparent this case revolves around "benefits" or "compensation" of the type contemplated by RCW Title 51. This being so, a liberal construction is not only appropriate but mandatory. RCW 51.12.010.

The court equates "benefits" with "compensation," which is described by RCW 51.32.010 as “payment or payments,” implying monetary awards to a worker or beneficiary, but in addition categorizes the payment of these fees (which are not mentioned within Chapter 51.32 RCW) as

benefits to the worker because the total amount of the benefits he or she receives are thereby not reduced by the costs of litigation. The court justifies this expansion by relying on the rule of liberal construction found in RCW 51.12.010.

When a term is not defined within the relevant statutes, nor definitely described or defined within case law, rules of construction permit reliance on a dictionary definition of the term to give it meaning. A "benefit" is defined in Webster's II New College Dictionary, Houghton Mifflin Co, (1995), at p. 103, as "payments made or entitlements available in accord with a wage agreement, insurance contract or public assistance program." This dictionary definition essentially equates a benefit in with a monetary payment, and is consistent with the holdings of *Tradewell Stores*. The penalty provided for by RCW 51.48.017 is a monetary payment made under the auspices of this State's industrial insurance program and that inures to the benefit of the injured worker. Therefore, this penalty is a "benefit" within the meaning of RCW 51.48.017.

The next question is whether the self-insured employer unreasonably delayed payment of the penalty. In *In re Frank Madrid*, BIIA Dec., 86 0224-A (1987) the test we adopted was whether the self-insured employer had a genuine doubt from a medical or legal standpoint about its liability to pay this benefit. We stated that if genuine doubt does not exist as provided by RCW 51.48.017, the self-insured employer must pay the injured worker a penalty for the unreasonable delay in payment of benefits that had become due. The order that directed payment of the penalty at issue in this appeal is the October 6, 2011 Department order in which it affirmed an earlier penalty assessment order that was timely protested by the self-insured employer. The third party administrator of the self-insured employer's workers' compensation claims received that order on October 8, 2011.

The self-insured employer paid the penalty on November 22, 2011, which is 45 days after the issuance of the October 6, 2011 Department order. This means that Ms. Eyrich had to wait over six weeks for benefits that were due and owing once the Department order was issued. The period of this delay is significant because it mirrors the period discussed in our significant decision of *In re Jacque Slade*, BIIA Dec., 04 11552 (2005). In *Slade,* we concluded that a delay in payment of benefits of over six weeks was unreasonable. We quote extensively from this decision at pages 2-3 because it provides an excellent discussion of the rationale for its holding, which is the same as our holding in Ms. Eyrich's case.

> RCW 51.48.017 provides that the self-insured employer shall pay a penalty for unreasonably delaying the payment of benefits when they become due. These benefits become due as soon as the claimant is

> entitled to them. The Department does not need to issue an order before the employer is required to pay benefits. See, *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919; 83 P.2d 1018 (2004) and *In re Jackie Washburn,* BIIA Dec., 03 11104 (2004).
>
> In this case, the self-insured employer was required to pay benefits once the November 17, 2003, order was issued if there was not a reasonable doubt that the worker was entitled to the benefit. Prior to that, there was an ongoing dispute and a genuine doubt with regard to entitlement. However, it took the self-insured employer until January 2, 2004, to issue a check. Ms. Slade was forced to wait six weeks during the holidays to receive her time-loss compensation. This may seem insignificant unless you are the disabled worker going without income. It is unreasonable for the self-insured employer to take this much time to decide whether it will pursue the claim further.
>
> We no longer subscribe to the former rule, which held that benefits were not due until the Department issued a payment order. Neither will we continue to hold that it is reasonable for a self-insured employer to wait until the sixty-day appeal period has passed before rendering payment. See, *In re Jackie L Washburn*, BIIA Dec., 03 11104 (2004); overruling *In re Agnes Levings*, BIIA Dec., 99 13954 (2000). According to the Court in *Nalley,* the Department's ability to issue orders in self-insured claims is to assist injured workers in receiving payments. It was not intended to delay the payments in legitimate claims. Similarly, the statutory appeal period cannot be used as a shield by employers who are reluctant to pay benefits.
>
> In this case, the self-insured employer took over six weeks to determine whether to appeal or protest the order. The delay between the December 15, 2003, discussion with the attorney and the issuance of the check on January 4, 2004, was also unreasonable.

Nonetheless, the self-insured employer and the Department argue that because this payment was made within the 60-day protest and appeal period set forth in RCW 51.52.050, WAC 296-15-266, which became effective April 1, 2006, after *Nalley's* and *Slade,* overrides the rule in those cases. WAC 296-15-266 reads:

> **What must a self-insurer do when the department issues an order assessing a penalty?** The self-insurer must make payment of the penalty assessment on or before the date the order becomes final.

We agree with the Department and the self-insured employer that if applicable, that regulation would provide the employer with legal doubt as to its duty to pay the penalty prior to the expiration of the protest/appeal period, which in this case would postdate the November 22, 2011 date of payment. The timing of the promulgation of this regulation makes it appear to be an attempt

to negate the holdings in *Nalley's* and *Slade*. However, we conclude that regulation is not applicable because the penalty is a benefit and therefore the regulation conflicts with RCW 51.52.050(2)(b). That statute states in part: "An order by the department awarding benefits shall become effective and benefits due on the date issued. . .." The remedy prescribed by the Legislature for the employer is to file an appeal to the order providing benefits and apply to the Board for a stay of payment of those benefits pending the disposition of the appeal. The self-insured employer did not avail itself of this remedy. Its delay in making payment of these benefits is without legal or factual justification. A further penalty is warranted. The Department order dated November 4, 2011, must be reversed and the matter remanded to the Department to calculate the appropriate amount of the penalty as provided by RCW 51.48.017, and direct the self-insured employer to pay that amount to the claimant.

FINDINGS OF FACT

1. On January 5, 2012, an industrial appeals judge certified that the parties agreed to include the Amended Jurisdictional History in the Board record solely for jurisdictional purposes.

2. On July 12, 2011, the Department issued an order in which it found the self-insured employer had unreasonably delayed the payment of $8,556.90 of time-loss compensation benefits due and owing Ms. Eyrich for the period of May 29, 2009, through August 31, 2010, and directed it to pay her an additional $2,139.22, consisting of a penalty assessed as provided by RCW 51.48.017. On or about August 8, 2011, the self-insured employer protested this order.

3. On October 6, 2011, the Department issued another order in which it affirmed its July 12, 2011 order, including the imposition of the penalty. On October 8, 2011, the third party administrator of the self-insured employer received its copy of the October 6, 2011 order.

4. On October 26, 2011, Ms. Eyrich requested the imposition of the further penalty at issue here due to the self-insured employer's delay in paying the penalty stated in the July 12, 2011, and October 6, 2011 orders. On November 4, 2011, the Department issued an order in which it denied her request for the additional penalty against the self-insured employer, this time for its delay in paying the earlier penalty.

5. On November 22, 2011, the self-insured employer's third party administrator mailed Ms. Eyrich a check for the full amount of the penalty assessed against it in the July 12, 2011, and October 6, 2011 orders. No appeal was filed to the October 6, 2011 order.

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2 There are no genuine issues of material fact and the claimant is entitled to judgment as a matter of law.

3. A Department-ordered penalty to be paid to the claimant by the self-insured employer for its unreasonable delay of payment of time-loss compensation benefits is a benefit within the meaning of RCW 51.48.017 and the Industrial Insurance Act.

4. The over six week delay by the self-insured employer in payment of the penalty assessed by the Department in its October 6, 2011 order was unreasonable within the meaning of RCW 51.48.017.

5. The Department order dated November 4, 2011, is incorrect and is reversed. This matter is remanded to the Department to calculate the appropriate amount of the additional penalty as provided by RCW 51.48.017, and direct the self-insured employer to pay that amount to the claimant.

DATED: January 2, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

DISSENT

I dissent. In order for a penalty to be applied to a penalty for alleged unreasonable delay in payment of the initial penalty, two issues must be determined. First, the initial penalty must be considered a benefit under RCW 51.48.017. The majority, based on liberal construction, has concluded that a penalty is a benefit within the meaning of RCW 51.48.017. Citing *In re James Coston*, Dckt. No. 11 12310 (September 11, 2012).

Although I am not persuaded by the rationale of the majority, and disagree that a penalty is a benefit, the second issue should be conclusive in this case. The second issue that must be determined is whether the 45 days between the date of the Department's penalty order and the payment thereof constituted unreasonable delay within the meaning of RCW 51.48.017.

The Legislature provided all aggrieved parties 60 days to appeal a Department order, decision, or award. RCW 51.52.060. This 60-day period is a reasonable period in which to evaluate the facts, evaluate the law, meet with an attorney, and fully evaluate the case to determine whether to appeal.

The Department recognized this when it promulgated WAC 296-15-266, which provided the 60-day appeal period to either protest/appeal or pay the benefit. The WAC specifically provides that if the penalty is paid within the 60-day appeal period, the delay is reasonable. The employer's payment in 45 days was well within the 60 days allowed and on its face is reasonable.

If the Legislature wanted aggrieved parties to determine whether to appeal within a shorter period, they could have shortened the appeal period. If summary judgment were to be appropriate under these facts, it should be granted to the self-insured employer. To conclude there is unreasonable delay is not supported by the facts.

The "over six weeks" bright-line test the majority reads into *In re Jacque Slade*, BIIA Dec., 04 11552 (2005), is not applicable in this case. I first note that neither *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919 (2004), nor *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 742 (1981), contain such a test. As the majority notes, the test we have adopted and the courts have approved is that stated by us in *In re Frank Madrid*, BIIA Dec., 86 0224-A (1987). The question as to whether the self-insured employer had a genuine doubt, from a medical or legal standpoint, about its liability to pay a benefit necessarily involves questions as to the state of mind of the employer and the information it had regarding the issue of entitlement to the benefits in question, and when it gained possession of that information. These issues are not susceptible to being reduced to a formulaic, specific number of days without consideration of the underlying factual circumstances. I believe that Ms. Eyrich understood the unaddressed factual issues here when she declined to file her own summary judgment motion and, in fact, stated at page 4 of the Claimant's Response to Self-Insured Employer's Motion for Summary Judgment, filed on February 21, 2012, "[t]he parties certainly dispute whether there existed a bona fide basis to challenge/protest the payments sufficient to 'stay' the employer obligation is [*sic*] this case."

In reaching its decision in *Slade* the Board specifically considered the self-insured employer's claims manager's actions between the employer's receipt of the Department order directing payment of the benefits (time-loss compensation benefits in that case) and the date the check for those benefits was issued for those benefits. It was only after consideration of those facts that the Board concluded that unreasonable delay existed in the *Slade* case.

The type of inquiry the Board underwent in the *Slade* case is necessary to determine whether the actions of the employer were reasonable and whether the thought processes provide evidence of genuine doubt from a legal and/or medical standpoint as to its liability to pay the benefit in question. Certainly, some amount of time is necessary for the employer to investigate the situation properly and fully evaluate the case before making a decision on whether to pay the benefit or file a protest or an appeal. Such an inquiry is at a minimum necessary in this case before it can be concluded that 45 days is an unreasonable period of time to fully evaluate the case. If the employer had chosen to protest or appeal the penalty rather than pay the penalty within the statutory appeal period, would the majority conclude the protest or appeal to be an unreasonable delay?

Summary judgment should have been granted to the self-insured employer as there is insufficient evidence to conclude that 45 days to fully evaluate a case is unreasonable, especially when the statute provided 60 days. At a minimum, this matter should be remanded to the industrial appeals judge to conduct an evidentiary hearing because there is insufficient information to conclude that 45 days is unreasonable. As genuine issues of material facts exist, summary judgment in favor of Ms. Eyrich is not appropriate.

Dated: January 2, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
JACK S. ENG Member